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SURVEY OF ILLINOIS LAW FOR THE YEAR 1950-1951*

VII. PUBLIC LAW

ADMINISTRATIVE LAW

THE SIGNIFICANT administrative law problems this year centered around the necessity for securing administrative rehearing, thereby giving rise to two Supreme Court decisions. In the case of *Granite City v. Illinois Commerce Commission*,¹ the railroad company applied to the Commission for permission to discontinue the operation of two of its trains. Opposition to the application was interposed by several of the municipalities located along the right of way. A compromise was finally effected under which the railroad agreed to provide a substitute for the discontinued service and the Commission entered an appropriate order. Subsequently, another petition was filed by the railroad, this time seeking approval of a proposed discontinuance of the substitute service. That request was granted but, on petition for a rehearing, the interested municipalities presented certain specific objections to the order as well as a general claim that the order was unreasonable and unlawful. The Commission, nevertheless, upheld the decision, as did the circuit court. Seeking reversal, the appellants argued that the Commission did not have the power to allow the discontinuance of the substituted service as no evi-

* Parts I to VI of this survey appeared in the issue for December, 1951, Vol. 30, No. 1. Limitations of space prevented the full publication thereof in that number.

¹ 407 Ill. 245, 95 N. E. (2d) 371 (1950).

dence had been presented to show that the original order, embodying the compromise, was erroneous or that circumstances and conditions had been altered so as to make the rescission appropriate. The railroad and the Commission countered with the contention that the municipalities were in no position to raise that issue on judicial review as they had failed to do so during the administrative rehearing.² The appellants then urged that they had met this requirement by alleging, in their petition for rehearing, that the order was "unreasonable and unlawful." The Supreme Court, however, held that the general allegation was insufficient to support the specific objections which were being advanced as it was the purpose of the statutory provision to require the party opposing the decision of the administrative body to make clear, both to the Commission and to other interested parties, the exact errors claimed to have been committed in order to provide an adequate basis for reconsideration.

In the second case, that of *Alton Railroad Company v. Illinois Commerce Commission*,³ a situation was presented in which several railroads had eliminated certain industries from their switching districts, apparently on the basis that the permissible rates were inadequate. The affected industries petitioned for a restoration of service to obtain the benefit of what they alleged were reasonable switching rates. Although the Commission dismissed the petition, the circuit court, on appeal, reversed and remanded the case to the administrative tribunal.⁴ The Commission, accordingly, reinvestigated and reversed its original decision, ordering reinstatement of the service at the original rate. A rehearing was requested and, eventually, was granted. At that rehearing all of the parties involved were allowed to present additional evidence and, on the basis thereof, the Commission modified its previous order so as to permit the railroads to have the advantage of a state-wide increase in freight rates as well as more time

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 111-2/3, § 71, provides: "No person or corporation in any appeal shall urge or rely upon any ground not set forth in such application for a rehearing before the Commission."

³ 407 Ill. 202, 95 N. E. (2d) 76 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 181.

⁴ That decision was later affirmed: 382 Ill. 478, 48 N. E. (2d) 381 (1943).

in which to re-establish the contested districts. The railroads then appealed to the circuit court where a motion was made to dismiss the appeal on the theory that the court did not have jurisdiction since the appellants had failed to request a rehearing with respect to the modified order.⁵ The carriers urged that they had fully complied with the statutory requirement when they had requested a rehearing upon entry of the original order and that it was not necessary to move for a second rehearing, particularly since the second order was merely a modification of the first and not an entirely new decision. The Supreme Court, however, found that contention to be erroneous, stating that, in order to determine whether an administrative decision was a new one, it would be necessary to examine into the issues decided. The original order had simply found that the existing switching rates were adequate. By allowing the railroads to take advantage of new freight rates, the Commission had decided an entirely new issue. That being the case, a second request for a rehearing was an essential prerequisite to an appeal.

The recent session of the Illinois legislature produced several measures affecting the state of administrative law. There has been an extension of the principle that judicial review of orders or decisions of specified administrative bodies shall be handled subject to the provisions of the Illinois Administrative Review Act.⁶ Of considerable more importance is the new requirement that administrative rulings of state agencies must be filed with the Secretary of State and be made available to the public.⁷

⁵ Ill. Rev. Stat. 1951, Vol. 2, Ch. 111-2/3, § 71, specifies that no appeal "shall be allowed from any rule, regulation, order or decision of the Commission unless and until application for a rehearing thereof shall have been filed with and acted upon by the Commission."

⁶ The following administrative bodies have been placed under the Illinois Administrative Review Act, to-wit: Board of Boiler Rules, County Boards of School Trustees, County Superintendent of Schools, Director of Vocational Schools, Fire Commissioners, Public Aid Commission, Sanitary Water Board, and Water Authority Trustees. See Laws 1951, pp. 2105, 1987, 1759, 1442, 1982, 2057, 1462 and 1964 respectively. In addition, decisions relating to such matters as the cigarette use tax, eggs and egg products, horse meat, mental health, physical therapy, plumbers and plumbing, social security for public officers and employees, unemployment compensation applications, university civil service, and voluntary health service plans are to be reviewed in the same manner: Laws 1951, pp. 1380, 1943, 1498, 1585, 2025, 1829, 2094, 34, 1289 and 569 respectively.

⁷ Laws 1951, p. 327, H. B. 141; Ill. Rev. Stat. 1951, Vol. 2, Ch. 127, § 263 et seq.

Compliance therewith is insured by the fact that new rules are not to become effective until ten days after the filing, except where an emergency exists,⁸ and those rules promulgated before the effective date of the new statute have to be filed on or before July 1, 1952, or are to be considered void.⁹ It is not intended that the filing requirement should apply to administrative orders of specific applicability or to regulations merely pertaining to the internal management of the administrative agency, for central filing in such cases would not be important as the general public would not be interested or directly affected.

CONFLICT OF LAWS

The only case noted which in any way dealt with an issue regarding the conflict which may exist in laws, and it more accurately reflected a problem concerning the extra-territorial effect to be given to an Illinois statute, is the case of *Eldridge v. Don Beachcomber, Inc.*¹⁰ The case was one in which an Indiana resident came to Chicago as the guest of one Slaughter who, according to the plaintiff, became intoxicated while on the defendant's premises. After leaving the defendant's establishment, Slaughter and the plaintiff drove back to Indiana and, while in that state, became involved in an automobile accident which caused plaintiff to suffer severe injuries. Suit was based on an alleged violation of the Illinois Dram Shop Act,¹¹ but that statute was silent on the point as to whether not only the sale of the liquor but also the injury must occur within the state boundaries. A motion to dismiss the suit was sustained, and the Appellate Court for the First District affirmed, on the ground that no state statute could be given extra-territorial effect, particularly when the legislature had made no provision to that end.¹² The situation would, however, seem to be one worthy of legislative consideration.

⁸ *Ibid.*, Ch. 127, § 266.

⁹ *Ibid.*, Ch. 127, § 265.

¹⁰ 342 Ill. App. 151, 95 N. E. (2d) 512 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 187.

¹¹ Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 135.

¹² On the point of giving extra-territorial effect to state law, when some point of connection with the state exists, see *Union Bridge & Construction Co. v. Industrial Commission*, 287 Ill. 396, 122 N. E. 609 (1919).

CONSTITUTIONAL LAW

By far the most important case falling within the category of state constitutional law to come before the Illinois Supreme Court during the period of this survey was that of *Department of Public Works and Buildings v. Gorbe*,¹³ a case dealing with the validity of the 1947 amendment to the Eminent Domain Act.¹⁴ That amendment purported to authorize the state highway department to bring condemnation proceedings for the purpose of acquiring private property for highway use and, at the same time, to file a declaration of taking which would result in an immediate vesting of title in the state provided a deposit was made, in court, of the estimated value of the property. If, upon a determination of the amount of just compensation to be paid, it appeared that an additional sum was needed, a deficiency judgment could be rendered against the state. Conversely, if the award proved to be less than the estimate, a judgment in favor of the state for the excess was to be in order. In general, the statute followed the line of the federal Declaration of Taking Act.¹⁵

Acting under this statutory authorization, the department had sued to condemn land for highway purposes, had filed the necessary declaration of taking, and had paid into court the amount of the estimated compensation. The owners of one of the parcels involved, defendants in that proceeding, moved to dismiss the declaration¹⁶ and to enjoin the department from interfering with their use of the property until such time as it would take to empanel a jury and secure an award as to the amount of compensation to be paid. The defendants relied on the claim that the amendment was unconstitutional for violation of Sec-

¹³ 409 Ill. 211, 98 N. E. (2d) 730 (1951). A note thereon will appear in the March, 1952, issue of the CHICAGO-KENT LAW REVIEW.

¹⁴ Laws 1947, p. 905, S. B. 3; Ill. Rev. Stat. 1947, Ch. 47, § 2a. The section was again amended, in 1949, to make it applicable to the condemnation of blighted vacant areas for housing purposes: Laws 1949, p. 866, S. B. 87; Ill. Rev. Stat. 1949, Vol. 1, Ch. 47, § 2a.

¹⁵ 40 U. S. C. A. § 258a.

¹⁶ This motion, together with an amended motion to dismiss the declaration, were treated by the court below as a motion to strike and to dismiss, filed pursuant to Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, § 5a.

tion 13 of Article II of the state constitution.¹⁷ The trial court denied the defendants' motion and held that title had vested in the state. On direct appeal,¹⁸ the Supreme Court sustained the defendants' contention and declared the amendment unconstitutional, deeming it to be the law that no citizen should be deprived of his property until compensation had not only been fixed but had also been paid to him.¹⁹ The court also indicated that, as the requirement of payment of just compensation was self-executing, it could not, in any way, be impaired by legislative enactment. This emphatic, but seemingly misguided, view of the subject would seem to close the door to the possibility of Illinois ever being placed in the same category as some fifteen other states which do possess statutes following the federal model.

The 1947 Price Posting Act, intended to regulate the sale and distribution of alcoholic liquors,²⁰ but found to be improper amendatory legislation because passed in such a manner as to conceal the real effect thereof,²¹ and the ill-advised Illinois Plumbing License Law,²² which could well be said to represent a classic example of an attempted unlawful delegation of the legislative power,²³ are illustrations of still other laws which have been found to be lacking when subjected to constitutional tests.

On the other hand, considering the ever-mounting problems stemming from a constantly increasing use of automobiles and

¹⁷ Ill. Const. 1870, Art. 2, § 13, provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state, shall be ascertained by a jury, as shall be prescribed by law."

¹⁸ Direct appeal to the Supreme Court is authorized by Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, § 12.

¹⁹ The court quoted from *Moore v. Gar Creek Drainage District*, 266 Ill. 399, 107 N. E. 642 (1914).

²⁰ Ill. Rev. Stat. 1949, Vol. 1, Ch. 43, § 206.

²¹ *Lombardo Wine Co. v. Taylor*, 407 Ill. 454, 95 N. E. (2d) 607 (1950). The statute concerned was said to violate Ill. Const. 1870, Art. 4, § 13, by reason of its indirect attempt to amend certain sections of the Liquor Control Act, Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 1 et seq.

²² Ill. Rev. Stat. 1949, Vol. 2, Ch. 111½, §§ 95-116.

²³ *People v. Brown*, 407 Ill. 565, 95 N. E. (2d) 888 (1950), noted in 39 Ill. B. J. 521 and 46 Ill. L. Rev. 323. The text of the old law was repealed and a new measure substituted by Ill. Laws 1951, p. 1829, H. B. 665; Ill. Rev. Stat. 1951, Vol. 2, Ch. 111½, § 116.1, et seq.

particularly with respect to the parking of cars and the interference such parking furnishes to the fluid flow of traffic, it is fortunate that the Supreme Court found itself free to uphold the so-called 1949 Parking Act.²⁴ A test of the constitutionality thereof was made in *Poole v. City of Kankakee*,²⁵ wherein the principal plaintiff, an owner and operator of a private parking lot, sought to enjoin the city and its officials from proceeding under an ordinance based on the statute directed toward the acquisition of land to be used as an off-street vehicle parking lot. Despite many objections which were offered to the act, not one of them was found to be valid. Principal stress had been placed on the point that it was reprehensible to grant power to municipalities to take private property for parking purposes and then to permit the leasing of such facilities to private operators.²⁶ By way of answer thereto, the court said that if this did result in private gain that benefit was merely incidental to the public purpose subserved by the statute. It is to be hoped that cities will now be encouraged to embark more freely on projects intended to supply the need for parking facilities and thereby save the streets and highways for their prime use as arteries of traffic.²⁷

MUNICIPAL CORPORATIONS

The General Assembly, as usual, made many changes in as well as additions to the Cities and Villages Act, but many of these are of technical rather than of general interest.²⁸ One enactment which should excite general interest, the so-called City Manager Act,²⁹ now grants authority to cities with up to 500,000 population to adopt the city manager form of government. The law, previously restricted to cities having not more than 5,000 in-

²⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 52.1—1 and § 52.1—2.

²⁵ 406 Ill. 521, 94 N. E. (2d) 416 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 188.

²⁶ Ill. Const. 1870, Art. 4, § 20, prohibits the loan of the credit of the state to any "public or other corporation, association or individual."

²⁷ See Levin, "Parking Facilities as Public Utilities," 29 CHICAGO-KENT LAW REVIEW 295-314 (1951), and note entitled "Private Financing of County Improvements," 46 Ill. L. Rev. 100 (1951).

²⁸ A brief summary of some fifty new measures in municipal law is provided in 40 Ill. B. J. 54.

²⁹ Laws 1951, p. 1001, H. B. 213; Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 20—1.

habitants,³⁰ will unquestionably be utilized by many municipalities which did not, heretofore, possess the power to operate under the city manager system.

In addition to statutory changes, several decisions were announced affecting municipal law, some of which were novel as well as interesting. Mention has been made of two cases relating to the jurisdiction of city courts.³¹ To those cases should be added decisions of the character of that rendered in *Erickson v. Fitzgerald*,³² one dealing with the liability of a municipality, and of its policemen, for damage caused by the negligence of officers while performing official duties. The law on that point has been altered and re-altered several times in the last few years. According to common law, the municipality was relieved of liability in such situations but the officer, as an individual, was not. That view was changed, in Illinois, by a 1939 decision of the Illinois Supreme Court which held both the municipality and the officer to be immune.³³ Following that decision, the legislature permitted suit against municipalities of 500,000 or over for injuries caused by the negligent operation of motor vehicles but preserved the immunity which had been declared in favor of the officer.³⁴ By an amendment adopted in 1945, the cause of action was broadened to include any injury, but the municipality was thereby required to indemnify the policeman for any judgment rendered against him.³⁵ On the basis thereof, it was held, in *Both v. Collins*,³⁶ that the language of the amendment had restored the liability of the officer. The new decision, one by the Appellate Court for the First District, takes the view that the injured person may not obtain a judgment against the city because it is now to be held liable only as an indemnitor. The decision leaves much to be desired, for it provides no real clarification of the statute.

³⁰ See Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 20—1.

³¹ See Civil Practice and Procedure, ante, particularly notes 1 to 4.

³² 342 Ill. App. 223, 96 N. E. (2d) 382 (1950).

³³ *Taylor v. City of Berwyn*, 372 Ill. 124, 22 N. E. (2d) 930 (1939).

³⁴ Laws 1943, p. 419.

³⁵ Laws 1945, p. 477. The statute now appears in Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 1—15.

³⁶ 339 Ill. App. 437, 90 N. E. (2d) 285 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 189.

The validity of municipal ordinances was made the subject of question in three cases. In one of them, that of *City of Nameoki v. Granite City*,³⁷ two Illinois cities had passed ordinances authorizing the conducting of elections to determine the question of annexation of each to the other. The voters gave their approval, but one of the cities, the one to be annexed, requested an injunction, claiming that a failure to specify the "terms" of the annexation in the ordinance had resulted in a void act. The Supreme Court held the failure to recite the terms was unimportant for the legislature had outlined not only the method but also the consequence of annexation.³⁸ In another, that of *City of Chicago v. Willett Company*,³⁹ although two judges dissented, the Illinois Supreme Court held that a carter whose every truck load contained both intrastate and interstate freight could not be held to have violated a Chicago ordinance by failing to take out and pay for a license required thereunder, even though the ordinance was not *per se* invalid.⁴⁰ A third case, that of *Poole v. City of Kankakee*,⁴¹ dealt with a scheme for the acquisition of land for off-street parking facilities. It has been commented upon elsewhere in this survey.⁴²

It would appear that an important question relating to municipal contract law will be settled in the not too distant future for the suit in *Yellow Cab Company v. City of Chicago*⁴³ points in that direction. The Court of Appeals for the Seventh Circuit there refused to pass upon an alleged liability of the city to the company for violation of what was said to be an agreement arrived at through the passage of an ordinance. It was alleged that, under

³⁷ 408 Ill. 33, 95 N. E. (2d) 920 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 281.

³⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 7—1 et seq.

³⁹ 406 Ill. 286, 94 N. E. (2d) 195 (1951).

⁴⁰ The United States Supreme Court granted certiorari, but later sought clarification of the decision: 341 U. S. 937, 71 S. Ct. 853, 95 L. Ed. 1349 (1951). The Illinois Supreme Court, not in the period of this survey, provided the requested clarification: 409 Ill. 480, 101 N. E. (2d) 205 (1951).

⁴¹ 406 Ill. 521, 94 N. E. (2d) 416 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 188.

⁴² See ante, this section, under the heading of Constitutional Law, particularly note 25.

⁴³ 186 F. (2d) 946 (1951).

an earlier ordinance, the city had agreed not to issue additional cab licenses in excess of a stated number until after a hearing and a determination of the matter of public convenience and necessity. The earlier ordinance had been held valid by a decision of the Illinois Supreme Court.⁴⁴ Despite this, the city had enacted ordinances increasing the number of licensed cabs, leading to a violation of the alleged agreement and damage to the plaintiff. In a suit for a declaratory judgment on these facts, the court found that Illinois followed the traditional distinction between acts done in a governmental and in a proprietary capacity but could find no Illinois case with regard to a possibility of immunity from liability arising from the exercise of a governmental function such as that of passing an ordinance. The court, under the circumstances, refused to settle the issue but remanded the case with directions to retain jurisdiction until the parties could obtain an authoritative decision from the state courts on the point as to whether or not a city would be liable for damages in an *ex contractu* action proceedings on that theory.

TAXATION

In 1945, as the result of a study made by a committee of the legislature, some measures were enacted with a design to produce an assessment of property throughout the state upon a basis of one hundred per cent of value. The tax program adopted, commonly referred to as the "Butler Bills,"⁴⁵ necessarily involved considerable readjustment of the system of tax limitations then in effect, so it was designed to culminate in a completely revised system after an interim five-year period.

The first step gave to the Department of Revenue the function of equalization, and directed that agency to certify to each county a multiplier, or equalization rate, to be applied to local assessments. It, however, only provided for equalization among the several counties and made no provision for equalization within a county, except for certain general equalization powers

⁴⁴ *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388, 71 N. E. (2d) 652 (1947).

⁴⁵ See Bresee, "Tax Rate Limitations", 39 Ill. B. J. 243 (1950).

made available to the county board. The General Assembly, in 1949, sought to correct this deficiency by creating the office of county assessment supervisor⁴⁶ but, in *Giebelhausen v. Daley*,⁴⁷ the Illinois Supreme Court invalidated the provision upon several grounds, the principal one being a noted arbitrariness in the system of classification and an improper attempt to confer what was characterized as legislative functions upon the executive branch of the government.

The Butler program also encountered further difficulties with the Supreme Court in the case of *Kremers v. City of West Chicago*.⁴⁸ The court there held invalid a 1949 amendment to Section 13 of the Library Act⁴⁹ on the basis of it being a form of prohibited special legislation. Section 13, as amended, purported to fix a limitation on the tax levy by reference to a ratio based on levels of assessment in effect in 1945. The amendment was said to make the law arbitrary and capricious, a fact which the court proceeded to illustrate by selecting certain cities of substantially the same population and showing how their assessments would be subject to widely varying rate limitations although their library needs appeared to be substantially similar.

Two decisions involve inheritance tax law. In *People v. Moczek*,⁵⁰ the court construed Section 1 of the statute,⁵¹ relating to an exemption in favor of "any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent," by holding that it was not necessary to fix the exact date when the relation of acknowledged parent to a child began so long as it was proved to have commenced before the child reached the age of fifteen years and continued for the requisite ten years. The court also held that the child was not precluded from the benefit of the exemption by reason of the fact that it was illegitimate and had a mother in existence who

⁴⁶ Laws 1949, p. 227 and p. 1261; Ill. Rev. Stat. 1949, Vol. 2, Ch. 120, § 482 et seq.

⁴⁷ 407 Ill. 25, 95 N. E. (2d) 84 (1950).

⁴⁸ 406 Ill. 546, 94 N. E. (2d) 337 (1950).

⁴⁹ Laws 1949, p. 1076; Ill. Rev. Stat. 1949, Vol. 2, Ch. 81, § 13.

⁵⁰ 407 Ill. 373, 95 N. E. (2d) 428 (1950).

⁵¹ Ill. Rev. Stat. 1951, Vol. 2, Ch. 120, § 375.

lived with the child in the home of the deceased and exercised control during the period of minority. The requirement that one of the parents of the child be deceased was held satisfied by the fact that the child's natural father was unknown, placing the child in much the same position as a legitimate one whose father had died.

In the other case, that of *In re Geatty's Estate*,⁵² the court applied an interesting pro-rata technique to determine the amount to be deducted for debts, taxes, and the like where the estate of the non-resident decedent consisted of assets located partly within and partly without the state. Although the statute is silent on this point, the court approved a deduction based on the percentage of assets within Illinois when measured in relation to the total assets,⁵³ an equitable arrangement within the spirit of the United States Supreme Court holding in *Maxwell v. Bugbee*.⁵⁴

Procedure relating to tax clean-up suits under the so-called "scavenger" act,⁵⁵ was the subject of discussion in *Sawicki v. Clemons*⁵⁶ and in *Brown v. Miner*.⁵⁷ The Illinois Supreme Court there held that an owner of a certificate of purchase of taxes who petitions for a deed under Section 235a of the Revenue Act must show compliance with Sections 263 and 265 thereof. The first of these sections requires the giving of notice to persons in possession or persons to whom the property has been taxed or specially assessed; the other relates to the furnishing of an affidavit of compliance. The parties who would have been entitled to receive notice had been made parties to the suits in question so should have been familiar with the facts. Prior to the rulings in these two cases there had been some reason to believe that a suit under Section 235a was an alternative to compliance with Sections 263 and 265, but the court held not by reason of Section 5 of Article IX of the state constitution.

⁵² 408 Ill. 383, 97 N. E. (2d) 307 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 283.

⁵³ The court relied on analogies provided by *People v. McCormick*, 327 Ill. 547, 158 N. E. 861 (1927), and *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350 (1904).

⁵⁴ 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124 (1919).

⁵⁵ Ill. Rev. Stat. 1951, Vol. 2, Ch. 120, § 716a.

⁵⁶ 408 Ill. 55, 95 N. E. (2d) 875 (1951).

⁵⁷ 408 Ill. 123, 96 N. E. (2d) 530 (1951).

Occupational tax cases still draw attention. In *Fefferman v. Marohn*,⁵⁸ the Supreme Court held that sales to a state or to a county of materials to be consumed by, or for use in caring for, hospital patients and inmates of other public institutions were to be taxed under the Retailers' Occupation Tax Act.⁵⁹ The decision in *Miller v. Department of Revenue*⁶⁰ provides an interesting commentary upon the problem of proving the amount of sales made by retailers. The practice of the department has been to establish a case against persons subject to tax by "re-constructing" sales through the application of certain percentage formulas to the amount of merchandise purchased. The court held, in substance, that while there was no objection to proving a case in that manner, the case so made was merely of prima facie character which had to yield to testimony that all sales made were rung up on cash registers and the totals thereof recorded daily in books used as the basis of tax returns. While legally correct, the decision will have the effect of making even more difficult the already difficult problem of administering the tax statute.

Even more important is the action of the United States Supreme Court in *Norton Company v. Department of Revenue*.⁶¹ On certiorari, that court ordered a modification of the earlier Illinois decision and placed a substantial restriction on the asserted applicability of the Illinois statute to out-of-state transactions. The taxpayer, a Massachusetts corporation, with its factory and head office in Massachusetts but with a branch office in Chicago, accepted direct mail orders as well as orders forwarded by the Chicago office. It sold at retail from the Chicago office but also filled a large portion of the orders directly from Massachusetts. The Illinois Supreme Court had treated all sales culminating in Illinois, including those received directly at the head office and shipped from there, as associated with the branch office maintained in Illinois, hence subject to tax. The United

⁵⁸ 408 Ill. 535, 97 N. E. (2d) 774 (1951).

⁵⁹ Ill. Rev. Stat. 1951, Vol. 2, Ch. 120, § 440 et seq.

⁶⁰ 408 Ill. 564, 97 N. E. (2d) 811 (1951).

⁶¹ 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951). Mandate pursuant to the decision therein has been issued by the Illinois Supreme Court: 409 Ill. 216, 99 N. E. (2d) 18 (1951).

States Supreme Court, treating those orders received and shipped directly from the head office and not forwarded or handled by the Chicago office as being a form of interstate commerce, declared for an exemption from taxation. The test to be applied would, then, seem to turn on whether the sale is (1) made within the state, (2) is originated there by local agents even though accepted and filled outside, or (3) is completed there by some form of delivery made by or through the local agent, so as to constitute a local transaction. All other dealings would appear to be interstate in character, hence non-taxable.

TRADE REGULATION

Except for two decisions noted elsewhere, one dealing with the right of a person doing business under an assumed name to enforce the contracts so made,⁶² and the other relating to the validity of the 1947 Price Posting Act,⁶³ it could be said that no issue of significance has developed in the field of trade regulation under state law.

VIII. TORTS

The derivative nature of certain tort causes of action is illustrated by two cases arising during the survey period. In the first, that of *Welch v. Davis*,¹ the Appellate Court for the Third District affirmed a judgment for defendant notwithstanding a verdict in favor of plaintiff in a wrongful death action, brought on behalf of a dependent daughter whose mother had been shot and killed by her second husband prior to the time he killed himself, because of a belief that an administrator can successfully sue only upon a showing that the decedent, if living, would have been able to recover. On the basis that the Married Women's

⁶² See discussion relating to *Grody v. Scalone*, 408 Ill. 61, 96 N. E. (2d) 97 (1950) under the heading of Contracts, particularly notes 1 to 3, ante.

⁶³ Ante, this section, note 20, for the holding in *Lombardo Wine Co. v. Taylor*, 407 Ill. 454, 95 N. E. (2d) 607 (1950).

¹ 342 Ill. App. 69, 95 N. E. (2d) 108 (1950). On leave to appeal, the Supreme Court, 410 Ill. 130, 101 N. E. (2d) 547 (1951), not in the period of this survey, reversed and declared the child's action was not derivative, hence not barred by the fact that the mother, if she had survived, would have been unable to sue. See note in 40 Ill. B. J. 242.

Acts² had not disturbed the alleged common law rule prohibiting the maintenance of a tort action by a wife against her husband for personal injuries inflicted by him on her,³ the court held the wrongful death suit to be derivative in character, hence barred by the same reasoning. In the other case, that of *Monken v. Baltimore & Ohio Railroad Company*,⁴ however, the Appellate Court for the Fourth District permitted a husband to recover for the destruction of his automobile and an even larger sum for loss of his wife's consortium, growing out of a crossing collision, while simultaneously denying a recovery for personal injuries suffered by the wife, who drove the car in the husband's absence, because she was found to be guilty of contributory negligence. The holding was conditioned on the fact that it was made to appear that the wife was not then acting as agent or servant for her husband so as to prevent an application of the doctrine of imputed negligence.⁵ There is occasion to doubt the validity of one or the other of these two decisions since it would seem as if the person seeking to recover on a tort committed by or against a third person must rest his action either on an independent right or else on one derived through another. If on the latter, the derivative right should be subject to all those defenses which would be available against a claim of invasion of the primary right.

Only one other case dealt with an issue of tort law not comprehended within the general topic of negligence and that was the libel suit entitled *Mitchell v. Tribune Company*.⁶ The newspaper there concerned had published two stories relating to plaintiff in which it had given plaintiff's name, had included the nickname of "Chink," and had referred to him as "Negro." Plaintiff apparently believed these additions to his name to be libelous *per se*, possibly because he thought the appellation "Chink" was intended to represent him to be Chinese, which he

² Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1 et seq.

³ *Main v. Main*, 46 Ill. App. 106 (1892).

⁴ 342 Ill. App. 1, 95 N. E. (2d) 130 (1950).

⁵ *Palmer v. Miller*, 380 Ill. 256, 43 N. E. (2d) 973 (1942).

⁶ 343 Ill. App. 446, 99 N. E. (2d) 397 (1951). Leave to appeal has been denied.

was not, and so too with respect to "Negro." In a brief opinion, the Appellate Court for the First District held it proper to strike a complaint based on such allegations, but lacking in any statement of special damage, because the references were said not to be libelous *per se*,⁷ without which plaintiff had no case. The printing of "fighting" words by way of characterization would seem, however, to be a developing form of actionable defamation.⁸

Negligence cases were both varied and interesting. The attractive nuisance case of *Smith v. Chicago & Eastern Illinois Railroad Company*⁹ represents no new turn in the law on that subject but it does serve to emphasize a predilection on the part of Illinois courts in favor of the majority view with respect to liability for artificial accumulations of water so as to form attractive nuisances¹⁰ while also providing a cautionary note regarding the proof necessary in such cases. The railroad there concerned had, at one time, created an artificial reservoir on its land, adjacent to a highway, for use in servicing its locomotives but had discontinued such use leaving the property open to fishermen, swimmers and the like who frequented the property. A pier which had, at one time, there been maintained had collapsed but the timbers had been allowed to remain and to project into the pond slightly below the surface of the water.¹¹ The decedent, a neighboring child under two years of age, was found floating on the surface of the water, within an hour after it had last been seen, bearing an extensive bruise on the side of its head. There was no medical testimony that death had been caused by drowning and it was problematical whether or not the child had fallen against the timbers of the pier and, knocked unconscious thereby,

⁷ The court relied on *Wright v. F. W. Woolworth Co.*, 281 Ill. App. 495 (1935).

⁸ See, for example, *Dilling v. Illinois Pub. & Ptg. Co.*, 340 Ill. App. 303, 91 N. E. (2d) 635 (1950).

⁹ 343 Ill. App. 78, 95 N. E. (2d) 95 (1950).

¹⁰ On that point, see note on *Plotzki v. Standard Oil Co. of Indiana*, 228 Ind. 518, 92 N. E. (2d) 632 (1950), in 29 CHICAGO-KENT LAW REVIEW 172.

¹¹ The presence of additional attractive features is important in view of the contrast provided by *Peers v. Pierre*, 336 Ill. App. 134, 83 N. E. (2d) 20 (1948), and *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114 (1895).

had ended up in the water. A judgment for the administrator of the child's estate, in a wrongful death action following the attractive nuisance theory, was reversed by the Appellate Court for the Third District because it found a fatal variance between the proof and the complaint which had charged the proximate cause of death had been by drowning. The court indicated that it could have reached the same result on the basis that the artificially accumulated water was not, *per se*, an attractive nuisance.¹²

Presence of a duty on defendant's part is, of course, an essential element in every negligence case. Carelessness on the part of a lender who had demanded that the borrower take out, and pay for, collision insurance on an automobile, which was mortgaged as security for the payment of both loan and insurance premium, back-fired in the case of *Schmidt v. Sinclair*.¹³ The Appellate Court for the First District there found it to be the duty of, and not merely an act of accommodation on the part of, the lender to promptly procure and pay for the insurance. It was, therefore, found possible to subject him to liability for damages incurred when he failed to procure insurance for approximately thirty days after the loan transaction and, in the interim, the automobile, in the possession of the borrower, had become damaged in a collision. An attempt to avert liability on the theory that, if insurance had been promptly procured, it would not have covered the particular loss was rejected as being without merit.

Automobile guest cases also involve problems over the duty owed by the driver to his guest. In that regard, there has been difficulty in arriving at a satisfactory definition of wilful and wanton conduct for use in such cases because simple negligence will be inadequate for purpose of recovery.¹⁴ The problem is

¹² Reliance was placed on *Wood v. Consumers Co.*, 334 Ill. App. 530, 79 N. E. (2d) 826 (1948).

¹³ 342 Ill. App. 484, 97 N. E. (2d) 129 (1951).

¹⁴ Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 58a, denies the guest a right to recover against the owner or operator, for injuries arising from the operation of the automobile in which the guest is riding, unless the accident "shall have been caused by the wilful and wanton misconduct" of the driver of such vehicle.

particularly acute where the court is asked, as on a motion for judgment notwithstanding the verdict, to decide as a matter of law that the precise conduct on defendant's part was or was not wilful and wanton. A violation of a speed regulation¹⁵ or a failure to apply brakes¹⁶ will not, alone, establish a guest case but, according to *Levanti v. Dorris*,¹⁷ a combination of these factors, especially when added to an attempt to negotiate a highway curve near a marked cross road and a traffic warning sign, in the face of cars approaching in full view, could well amount to wilful and wanton conduct on the part of the driver. A special finding of wilful and wanton misconduct, based on proof of that character, was there approved.

The defense of assumption of the risk, not entirely eliminated from the law, appeared in two rather novel situations. While certain types of workers may be said to assume risks inherent in their occupations, they are entitled to protection against unusual or extra-ordinary conditions of which the employer may be aware. A racing jockey sued a horse owner, in the first case, a negligence action entitled *Gray v. Pflanz*,¹⁸ basing his claim on the theory that the proximate cause of his injury, produced when the horse he was riding crashed into a fence during the running of a race, was the owner's failure to warn him of an unusual peril, to-wit: that the horse was blind. A judgment for plaintiff was ordered reversed by the Appellate Court for the Fourth District when it failed to find evidence in the record that the defendant, who had hired the jockey to ride the race, was in any way aware of the horse's blindness, if in fact it was blind, or had represented its condition to be sound. Absent such knowledge or representation, the court said the risk was one inherent in the particular occupation for which no recovery could be permitted.

¹⁵ *Bartolucci v. Falletti*, 382 Ill. 168, 46 N. E. (2d) 980 (1943).

¹⁶ *Clarke v. Storchak*, 384 Ill. 564, 52 N. E. (2d) 229 (1944).

¹⁷ 343 Ill. App. 355, 99 N. E. (2d) 398 (1951). Leave to appeal has been denied.

¹⁸ 341 Ill. App. 527, 94 N. E. (2d) 693 (1950).

An attempt was made in the second case, that of *Meyer v. Riverview Park Company*,¹⁹ to extend the doctrine of the case of *Neering v. Illinois Central Railroad Company*,²⁰ one which would hold a carrier liable for injury done to a passenger by the criminal assault of a trespasser or the like, permitted to intrude upon a railroad station, to a case involving a dispute between two patrons of the same ride in defendant's amusement park. Following one seemingly insignificant assault over a tussle for a seat, the plaintiff shortly thereafter placed himself in a position where he could be, and was, severely injured by his original assailant. He sued the amusement park owner on the theory that it had the duty, by reason of its knowledge of the prior altercation, to protect him, a fare-paying passenger, from further assaults. The court held that one element of the Neering doctrine required that the passenger should, himself, exercise due care to avoid assault, which element it found to be lacking in the instant case inasmuch as plaintiff, instead of seeking protection from defendant's employees had deliberately exposed himself to the possibility of danger. Recovery was, therefore, denied.

Railroad and highway crossing collisions occur most frequently because both the train and the automobile involved are in motion at the time but the presence of a stalled automobile on a track at a highway crossing is not an unknown phenomenon and more than one serious accident has been caused thereby. The case of *Janjanin v. Indiana Harbor Belt Railroad Company*,²¹ dealing with that type of situation, is interesting because the court said it could find no state authority as to the degree of duty on the part of the autoist to discover the perilous nature of his predicament, and to abandon his effort to preserve his property in the interest of saving his life or limb, in the face of an onrushing train. The railroad had there urged adoption of the federal

¹⁹ 342 Ill. App. 379, 96 N. E. (2d) 379 (1950). Leave to appeal has been denied.

²⁰ 383 Ill. 386, 50 N. E. (2d) 497 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 152.

²¹ 343 Ill. App. 491, 99 N. E. (2d) 578 (1951). Leave to appeal has been denied.

view on the subject,²² one which requires the driver to vacate, rather than to remain in, a position of known danger so as to make him guilty of contributory negligence if he does not leave but continues in his effort to rescue his property. It sought, in that fashion, to provide support for the action of a trial judge in denying a new trial and entering judgment for the defendant carrier notwithstanding a verdict for the driver-plaintiff. The Appellate Court for the First District, however, disapproved that view of the law, except as it might be applied in cases where the crossing is located on a little traveled road in a rural area where the likelihood of a stalled car is relatively rare, and preferred to hold that it was equally the duty of the railroad to be alert for the possibility, in well populated areas, so as to be able to prevent harm to the stalled car and its driver if conscious of his presence in time to avoid injury. The court did not advocate adoption of a "last clear chance" doctrine but did say it was irrational to expect that a reasonable man would immediately abandon his stalled automobile, to remove himself from a place of potential danger, when by dint of some effort he might not only preserve his own property but also prevent injury to others in the event a train was derailed by the collision, particularly where he was given no special warning of the approach of the train. It refused, therefore, to conclude that the decedent, killed in such a collision, was guilty of contributory negligence as a matter of law and ordered the verdict reinstated.

This survey might well be closed with a word of caution to some, if not all, members of the Illinois bar in whose interest it is prepared. Personal injury lawyers in the Chicago area must certainly take note of the holding in *Schuman v. Chicago Transit Authority*.²³ The Supreme Court there held the notice provisions of the statute creating the transit authority²⁴ to be constitutional

²² See *Gulf, M. & O. R. Co. v. Freund*, 183 F. (2d) 1005 (1950). Johnsen, J., wrote a dissenting opinion.

²³ 407 Ill. 313, 95 N. E. (2d) 447 (1950).

²⁴ Ill. Rev. Stat. 1951, Vol. 2, Ch. 111½, § 341.

and affirmed a judgment dismissing the cause for non-compliance with the statute. The case also indicates that the furnishing of an accident report to the authority is not the type of notice required by law,²⁵ but that formal notice, of the sort customarily used in cases involving personal injury claims against municipalities,²⁶ is to be desired. Prompt preparation and service of such a notice may be vital to the success of the client's cause.

²⁵ See also *Hayes v. Chicago Transit Authority*, 340 Ill. App. 375, 92 N. E. (2d) 174 (1950).

²⁶ Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 1—11. See also *Kennedy v. City of Chicago*, 340 Ill. App. 100, 91 N. E. (2d) 138 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 380-1, on the type of notice required in suits based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 512 et seq.

LEGAL FACETS OF THE INCOME TAX RATE LIMITATION PROGRAM

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THE IDEA of placing a constitutional ceiling upon the power of a government to tax is neither new nor revolutionary. Seventeen precedents exist within the United States for limitations of that character as seventeen state constitutions make specific provision on the point. These self-imposed limitations are set forth as annual maxima and take one of three forms, to-wit: (1) a stipulated number of mills per dollar of assessed valuation of all taxable property within the state,¹ (2) a designated number of cents,² or a percentage of the assessed valuation,³ beyond which the taxing authorities may not go. In terms of date of adoption, these provisions run back to as early as 1864, in the case of Nevada, but one, in the case of Georgia, is as recent as 1945. They cannot, then, be written off as being typical of, or essentially related to, the Granger Movement of the late Nineteenth Century. It is true, however, that the states concerned, with the exception of Michigan, lie west of the Mississippi River or are to be found in the South, for a constitutional ceiling on the power of a state government to tax has not been utilized by Eastern or New England states, nor by those states bordering on the Pacific. While the cost of state government has been rising with the years,

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¹ Eleven state constitutions fit this category with limits varying from two mills to fifty mills: S. D. Const. 1889, Art. 11, § 1, two mills; Utah Const. 1896, Art. 13, § 7, two and four-tenths mills; Okla. Const. 1907, Art. 10, § 9, three and one-half mills; Colo. Const. 1876, Art. 10, § 11, four mills; N. Mex. Const. 1911, Art. 8, § 2, four mills; N. D. Const. 1889, Art. 11, § 174, four mills; Wyo. Const. 1890, Art. 15, § 4, four mills; Ga. Const. 1945, Art. 7, § 1(2), five mills; La. Const. 1921, Art. 10, § 3, five and one-quarter mills; Ida. Const. 1890, Art. 7, § 9, ten mills; Nev. Const. 1864, Art. 10, § 145.01, fifty mills.

² Three states have limitations of this kind with variation ranging from twenty to one hundred cents: Mo. Const. 1875, Art. 10, § 8, twenty cents; Tex. Const. 1876, Art. 8, § 9, thirty-five cents; W. Va. Const. 1872, Art. 10, § 1, one hundred cents.

³ In this category are the constitutional provisions of three states, to-wit: Ala. Const. 1901, Art. 11, § 214, sixty-five one-hundredths of one per cent; Ark. Const. 1874, Art. 16, § 8, one per cent; Mich. Const. 1908, Art. 10, § 21, one and one-half per cent.

the impact of the burden thereof has been distributed through the use of such newly developed methods as sales, use, or similar indirect-forms of state taxation to the point where there has been little agitation for an extension of the concept of constitutional tax limitation to other states.

In the field of the federal government, however, the story is quite different. There, governmental reliance on income taxation as a prime source of revenue, with a steady and persistent demand for higher and yet higher income tax rates, has generated pressure for the adoption of an amendment to the United States Constitution placing a twenty-five per cent ceiling on the federal power to levy income taxes.⁴ Without comment on the point that much of the claimed need for federal revenue would be abated if state governments would refrain from looking to Washington for subsidization, it is proposed to consider here some of the legal facets related to this demand for constitutional revision.

Beginning in 1939, a movement to secure an appropriate constitutional amendment designed to limit income tax rates, at least in peace time, has spread widely. As it would be unrealistic to expect Congress to initiate the step, the method generally pursued has been one looking toward state action memorializing Congress to call a convention for the purpose of considering such an amendment.⁵ That method has not heretofore been utilized as a permissible manner for securing constitutional revision as all of the existing amendments originated with Congress and were submitted by it to state legislatures or to state conventions for the purpose of securing the necessary popular approval. Resolutions in favor of a rate-ceiling amendment, asking Congress to call a convention, have been passed by twenty-six of the state legislatures in the period between 1939 and the present time,⁶ and it is

⁴ Prior to the adoption of the XVI Amendment, the federal revenue was principally derived from duties and excise taxes imposed pursuant to U. S. Const., Art. I, § 8.

⁵ U. S. Const., Art. V.

⁶ States which have acted include Alabama, Arkansas, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Utah, Wisconsin, Wyoming.

anticipated that similar resolutions will be submitted in at least seven more state legislatures in session this year.⁷ If six more states join the list, the essential two-thirds rule would have been fully observed but for the fact that four of the states which originally voted favorably have since taken action to rescind their respective resolutions,⁸ Illinois being among them, and have thereby revived the question as to the operative effect of a retraction by a state legislature after a favorable vote has once been given on an issue of constitutional amendment.

There would appear to be sufficient precedent, growing up under prior amendments, to indicate that the purported retraction should fail in purpose so that, with six more states added to the list, Congress should be empowered to act upon this growing demand for constitutional limitation on income tax rates. In the case of the Fourteenth Amendment, for example, the New Jersey and Ohio legislatures were originally among those state legislatures which voted approval.⁹ They subsequently took action to rescind their respective ratifications,¹⁰ but Congress, upon receipt of advice of the passage of ratifications by the necessary three-fourths of the states, adopted a resolution which listed the ratifying states, including New Jersey and Ohio,¹¹ and transmitted that resolution to the Department of State. The then Secretary of State, William H. Seward, pursuant to such resolution and acting under statutory duty, thereupon issued his certification declaring the Fourteenth Amendment to be an integral part of the federal constitution.¹² He, too, listed the ratifying states and included New Jersey and Ohio in that category.

In much the same way, when the Fifteenth Amendment was proposed, the state legislature of New York originally voted in

⁷ The seven states are Arizona, California, Colorado, Maryland, New York, South Carolina and Virginia.

⁸ See Ala. Acts 1945, p. 155; Ill. Laws 1945, p. 1797; Ky. Acts 1946, p. 720; Wis. Laws 1944-5, pp. 1126-7.

⁹ See, for example, Ohio Laws 1867, pp. 320-1.

¹⁰ The proclamation of the Secretary of State mentions the purported action taken and notes it to be "a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual." 15 U. S. Stat. at L. 707.

¹¹ 15 U. S. Stat. at L. 706-7.

¹² *Ibid.*, p. 707.

favor of it but later took action to rescind the original determination.¹³ Again, after ratification had been obtained by the requisite three-fourths of the states, Hamilton Fish, in his capacity as Secretary of State issued his certificate that the amendment had been adopted and, in the list of supporting states, he included New York.¹⁴

Ratification by state legislatures has been directed by Congress in the case of all but one of the twenty-two amendments to the United States Constitution. In the case of the Twenty-first Amendment, designed to repeal the ill-fated liquor prohibition of the Eighteenth Amendment, Congress did direct that ratification thereof be made through state conventions. This exception to the general policy historically followed was made seemingly *ex industria*. As speed was not facilitated thereby, the only feasible reason for this exception may be said to rest in the fact that the Twenty-first was the only one proposed which was designed to repeal a prior constitutional amendment. It is possible that Congress may have thought it would be incongruous for state legislatures, in order to ratify the proposed Twenty-first Amendment, to take a step which would, in effect, rescind the prior action which they had taken constituting the approval of the Eighteenth Amendment. Actually, of course, the proposal was treated as a new matter but, in essence, it was a repeal, or a rescission, of earlier action. To avoid any question, the issue was submitted to agencies closer to the seat of sovereignty, that is to the peoples of the several states acting through popularly chosen conventions. By so doing, precedent opposed to legislative retraction of an earlier favorable vote on a constitutional question was left undisturbed. There would, then, be reason to believe that all states which have acted favorably on the proposed income tax limitation, regardless of later retraction, should be counted for purpose of securing the necessary quorum.

The second issue which may require consideration is one as

¹³ 16 U. S. Stat. at L. 1131-2 recites: "... it appears from an official document on file in this Department that the ... State of New York has since passed resolutions *claiming to withdraw the said ratification.* ..." Italics added.

¹⁴ 16 U. S. Stat. at L. 1131-2.

to whether or not, because certain of these state resolutions were passed over ten years ago, it could be said that they have become devitalized by lapse of more than a reasonable period of time, thereby requiring the elimination of such states as Wyoming, Mississippi and Rhode Island from the present count with the possible addition of others as time passes. The Wyoming resolution, first in the field, was adopted over twelve years ago,¹⁵ while those of Mississippi and Rhode Island date back to 1940.¹⁶ Persons opposed to the movement to secure the adoption of an income tax rate limitation amendment might base their opposition, at least in part, on the holding in the case of *Dillon v. Gloss*.¹⁷ It was there decided (1) that Article V of the United States Constitution impliedly requires that a submitted amendment be ratified within a reasonable period of time after proposal; (2) that Congress may, at the time of submission, fix a reasonable time for ratification; and (3) that a fixed period of seven years would be considered as reasonable for this purpose.

The fallacy of the objection, if made, would appear evident from a reading of the statement made by Mr. Justice Van Devanter, speaking on behalf of a unanimous court, in the *Dillon* case. He said: ". . . proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time."¹⁸ The time interval which must not be unreasonable is the interval between proposal and ratification of an amendment. The doctrine of the case has no application to, nor could it support any argument in opposition to, the several resolutions calling for a constitutional convention. There is nothing in either constitutional provision or decision making the reasonable time period pertinent to those steps which precede the formulation and submission of a proposed amendment. There is, as yet, no proposed amendment nor will there be one until Con-

¹⁵ Wyo. Laws 1939, p. 259, H. J. M. 6.

¹⁶ Miss. Gen. Laws 1940, p. 602, S. R. 14; Rhode Island Acts 1940, pp. 744-6, S. R. 80.

¹⁷ 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

¹⁸ 256 U. S. 368 at 374-5, 41 S. Ct. 510, 65 L. Ed. 994 at 997.

gress calls a convention, that convention proposes an amendment or amendments, and Congress directs the mode of ratification. Until then, no issue regarding the reasonableness of the time interval between the initiatory steps taken by one state and the reaching of a climax by the passage of the necessary thirty-second resolution could arise.

No greater strength is provided with respect to this objection by anything said or done in the case of *Coleman v. Miller*.¹⁹ True it is that Mr. Justice Butler, with Mr. Justice McReynolds concurring, there dissented on the point as to whether the Kansas legislature had delayed its ratification of the Child Labor amendment beyond a reasonable period of time. It was his belief that a thirteen-year interval between proposal and ratification constituted an unreasonable length of time. Aside from the fact that his views appear in a dissenting opinion, hence possess little beyond persuasive effect, it may be noted that, as in the *Dillon* case, the stress is on the time period between submission of a proposed amendment and its ratification, not one relating to the initiatory steps.

Assuming that no state action already taken is ineffective for the purpose, whether by reason of ineffectual attempt at retraction or by the long passage of time, the next problem would seem to be one as to the character to be given to the several state resolutions after a quorum has been reached. If they are but directory in character, Congress could still prevent action on the proposed income tax rate limitation by tabling the matter in much the same way it did, years ago, with regard to the many memorials, resolutions, and petitions presented to it relating to slavery. If, on the other hand, the summons is of mandatory character, Congress would have no alternative in the matter. It would either have to pass enabling legislation calling the convention into session or be guilty of a clear violation of its constitutional duty.

In that connection, the language of the Constitution itself becomes important. Article V thereof, providing for its amendment, directs that "The Congress . . . on the application of

¹⁹ 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385, 122 A. L. R. 695 (1939).

the legislatures of two-thirds of the several states, *shall* call a convention proposing amendments.”²⁰ In the light thereof, it is not surprising that all writers on the subject are in agreement on the point that, when a sufficient demand is made, it is mandatory upon Congress to call a convention. Professor Rottschaefer, for example, has said that amendments “. . . may be proposed by Congress on its own initiative whenever two-thirds of both houses shall deem it necessary, or by a convention called for that purpose which Congress *is required to call* on application of the legislatures of two-thirds of the states.”²¹ “It would appear,” wrote Professor Willoughby, “that the act thus required of Congress is a purely ministerial one in substance, if not in form, and the obligation to perform it is stated *in imperative form* by the Constitution.”²² Mr. Justice Story, as long ago as 1816, pointed out, through the medium of the decision in *Martin v. Hunter’s Lessee*,²³ that the word “shall” as used in the Constitution imports the imperative and the mandatory. There can, then, be little doubt on the score as to the action Congress should take upon receipt by it of a sufficient number of state resolutions dealing with the income tax proposal.

The question then could become one as to what action could be taken if Congress, despite the sufficiency of the memorialization, should either fail or refuse to call a convention for the proposing of amendments and the pressure of public opinion should prove ineffective to prod it into action. It is not expected that Congress would attempt to defeat the will of more than a majority of the states, but if it did clear legal remedy exists to deal with that eventuality. That remedy could take the form of a writ of mandamus directed to each individual member of Congress. It would not be necessary to search very far for precedent. Two cases will serve to illustrate what might be accomplished through the use of that form of proceeding. In *State v. Town Council of*

²⁰ U. S. Const., Art. V. Italics added.

²¹ Rottschaefer, *Handbook of American Constitutional Law* (West Publishing Co., St. Paul, 1939), p. 388. Italics added.

²² Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis & Co., New York, 1929), Vol. 1, p. 597. Italics added.

²³ 14 U. S. (1 Wheat.) 304, 4 L. Ed. 97 (1816).

South Kingston,²⁴ for example, the Supreme Court of Rhode Island issued such a writ against a municipal quasi-legislative body, pointing to the fact that the case was a proper one for judicial consideration. It there said:

One office of mandamus is to enforce obedience to statute law. In general, it lies to compel all officers to perform ministerial duties, as well as to compel subordinate courts to perform judicial duties; but not to compel the exercise of discretion in any particular way. It is not contended that the duty of the town council in this matter is other than ministerial. Mandamus is peculiarly the proper remedy when other specific remedies are wanting. The remedy which a legislature can provide is to make a law applicable to the case. When the law is made, it is for the court to enforce it, or to punish for disobedience of it. In either function, it must construe the statute, *i. e.*, declare what it means. In the present case, if the law already made imposes a present duty, no further legislation would make it more imperative. Any legislative act designed as a remedy must impose ministerial duties upon individuals. The court must again be resorted to, to compel such individuals to perform those duties. So that in the last analysis this remedy by mandamus is the only specific and efficient one, and if it is not afforded there are no other means which can give to the electors the opportunity to exercise such rights as the law gives them.²⁵

In the other, that of *Virginia v. West Virginia*,²⁶ the United States Supreme Court itself issued such a writ against a state legislature. It answered a challenge thereto by saying:

The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. Insofar as the duty to award that remedy is disputed merely

²⁴ 18 R. I. 258, 27 A. 599, 22 L. R. A. 65 (1893).

²⁵ 18 R. I. 258 at 265, 27 A. 599 at 602.

²⁶ 246 U. S. 565, 38 S. Ct. 400, 62 L. Ed. 883 (1918).

because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said.²⁷

There is no likelihood, therefore, that the remedy would prove inadequate for the congressional duty, in relation to calling a convention for the purpose of considering amendments to the constitution, is clearly ministerial in character and would require no exercise of discretion which would militate against the use of mandamus.²⁸

Naturally, such a proceeding would have to be brought by some one acting as relator and would have to be instituted in an appropriate court. Although the United States Supreme Court itself issued the writ in the West Virginia case aforementioned, it did so because recourse had been had to its original jurisdiction over suits wherein two or more of the United States appear as parties.²⁹ Not being vested with original jurisdiction over mandamus proceedings as such, but merely empowered to use that remedy as a necessary incident to a jurisdiction already acquired, it would obviously be improper to institute the action in the United States Supreme Court. In fact, since *Marbury v. Madison*,³⁰ any attempt to provide that court with original jurisdiction over mandamus, short of a constitutional amendment so providing, would be ineffective. There is no question, however, since the holding in *Kendall v. United States*,³¹ that federal district courts, including the courts of the District of Columbia, are empowered to act in such matters and choice of a tribunal in the last mentioned area would seem preferable so as to facilitate the acquisition of jurisdiction over the person of members of Congress. An appeal from a decision of such a court could, if necessary, be taken to the Supreme Court of the United States.

²⁷ 246 U. S. 565 at 603-4, 38 S. Ct. 400, 62 L. Ed. 883 at 891.

²⁸ That mandamus will not lie against the members of a state legislature to compel performance of a duty requiring the exercise of discretion, see *Fergus v. Marks*, 321 Ill. 10, 152 N. E. 557, 46 A. L. R. 960 (1926).

²⁹ U. S. Const., Art. III, § 2.

³⁰ 5 U. S. (1 Cranch) 368, 2 L. Ed. 60 (1803).

³¹ 37 U. S. (12 Pet.) 524, 9 L. Ed. 1181 (1838).

As to the designation of a relator, Mr. Walter K. Tuller, writing in the *North American Review*, has indicated that it is believed that

such a proceeding may be instituted by any citizen. Every citizen of the country has a direct interest that the Constitution shall be obeyed, and that interest is none the less real and entitled to recognition and protection by the courts that it is not capable of financial computation. Indeed, the very fact that he has no other remedy serves rather, under the established principles governing its issuance, to emphasize his right to this writ.³²

Whether the writ would be obeyed, or whether the claim might be advanced that one department of the federal government is powerless to assert its authority over another and co-ordinate branch of the same government, are questions which could not be answered at this time and may, for that matter, never arise. As Mr. Tuller states, every officer, of whatever branch, is sworn to support and obey the Constitution, and it is "the natural presumption, fully justified by our history, that none will refuse to obey its mandates as interpreted by that body whose function and duty it is to do so."

This analysis has been pursued with an additional thought in mind. At the moment, less than thirty-two states have adopted resolutions calling for a convention to consider a specific proposal relating to a constitutional amendment prescribing limitations on the power of the federal government to levy income taxes. Enough state legislatures have, from time to time, passed resolutions pertaining to other subject matters, however, so that, if these states could be added to the twenty-six expressly favoring the income tax proposal, the necessary quorum would have already been reached and could form the basis for immediate action. Long prior to the action of the Wyoming legislature on the income tax question, thirty-six state legislatures had passed resolu-

³² Tuller, "A Convention to Amend the Constitution—Why Needed—How It May Be Obtained," 11 No. *Amer. Rev.* 369, particularly 382-3 (1911).

tions at varying times memorializing Congress to call a convention. A list of the states involved was submitted to the Senate, in 1930, by Senator Tydings of Maryland during the second session of the Seventy-first Congress.³³ His compilation was recognized as authoritative by a bar association committee which had been charged with the duty of looking into and reporting on general proposals relating to amendments to the federal constitution.³⁴

Nine of the states so listed had passed resolutions dealing exclusively with the subject of, or advocating the direct election of, United States senators,³⁵ so it might be regarded that these resolutions had been negated by the adoption of the Seventeenth Amendment. Congress itself removed the necessity for popular action on that point through conventions by responding to the prevailing sentiment with its own proposal which was speedily ratified and proclaimed in 1913. It would appear to be no more than logical that these nine states, except as they may have specifically acted on the income tax question, should not be counted for quorum purposes. But all told, during the height of the senatorial discussion, some twenty-six states adopted resolutions and most of these were quite general in scope although they may have been framed with the same thought in mind.

Some writers have expressed a belief that all these calls have been rendered sterile. For example, Professor Orfield wrote: "In 1901 several legislatures petitioned for a convention to consider an amendment for the popular election of Senators, and by 1909 twenty-six states had petitioned for that purpose. The adoption of the Seventeenth Amendment would perhaps destroy the effect of these petitions."³⁶ The aforementioned bar association committee also indicated that it was "of the opinion that as the purpose in filing the petitions . . . was satisfied . . .

³³ Sen. Doc. 78, 71st Cong., 2d Sess.

³⁴ 74 Cong. Rec. 2924-5 (1931); 17 A. B. A. J. 143 (1931).

³⁵ The nine are illustrated by Ark. Laws 1903, p. 483; Cal. Stats. 1903, p. 682; Ky. Acts 1902, p. 394; Me. Laws 1911; Minn. Laws 1901, p. 676; N. J. Laws 1907, p. 736; Pa. Laws 1901, p. 860; Utah Laws 1903, p. 204; and Wyo. Laws 1895, p. 298.

³⁶ Orfield, *The Amending of the Federal Constitution* (University of Michigan Press, Ann Arbor, 1942), pp. 42-3.

they have become ineffective.” It did add that if this conclusion was “doubtful concerning petitions requesting a convention for general purposes,” still it was sufficient to say, at that time, that the deduction of the number relating exclusively to the popular election of senators would “result in reducing the remaining number substantially below that required for the needed two-thirds.”³⁷

A simple mathematical calculation will reveal, provided all of these resolutions are not invalidated, that the quorum point has been reached prior to this time. Thus, if the nine resolutions relating to the popular election of senators be deducted from the thirty-six mentioned in the Tydings report and the product thereof be added to the twenty-six dealing with the subject of an income tax limitation, the net result would be a total of fifty-three. But, of course, several of the thirty-six states which have passed diverse types of resolutions prior to 1939 are included in the list of twenty-six which have taken specific action on the income tax question. To be exact, thirteen states fall into this category of duplicate action.³⁸ If these, in turn be deducted, there would still remain forty states, or eight more than the thirty-two required by Article V of the Constitution, to make it imperative and mandatory upon Congress to call a convention at this time. Such a convention could have for its purpose the considering and proposing of amendments at least on the tax question, if not on any or every possible point, for every general call would logically include, within itself, the lesser and specific topic of tax limitation.

The question which arises at this point is whether it would be proper to count outstanding resolutions which pertain to different subject matters together for the purpose of securing the necessary number of states or whether only those resolutions limited exclusively to the same topic may be counted. What little authority there is on the subject would approve the first of these views. Professor Orfield has written to the effect that no prob-

³⁷ 17 A. B. A. J. 143 at 145.

³⁸ The thirteen are Alabama, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, Texas, and Wisconsin.

lem exists if two-thirds of the state legislatures asked for a convention for the purpose of general revision or for revision in the same particular. It is, he notes, when "one legislature desires a convention for one purpose, as to prohibit polygamy, another legislature for another purpose, as to adopt the initiative and referendum, and a third legislature for a general purpose" that some doubt would arise whether the prerequisite for a call has been met. He indicated that the "better view would seem to be that the ground of the application would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes."³⁹ In much the same vein is the comment of Wayne B. Wheeler who expressed the opinion that where "thirty-two state legislatures made application for a convention, each requesting a different amendment" the result might be considered "sufficient to call a convention on the ground that they conclusively showed a wide-spread demand for changes in government."⁴⁰ Is there not occasion, then, to believe that Congress should act without further delay?

No attempt has here been made to evaluate the merit or wisdom of the proposed limitation on income tax rates, other than to note that if such a proposal was submitted and ratified it would, without question, become binding on the federal government, the powers of which are no more than delegated ones. It, unlike the truly sovereign state, lacks an unfettered power to tax and may derive its revenue only from those sources and in the manner prescribed by the constitution.⁴¹ The argument will, therefore, probably be raised that any limitation of the type which has been proposed would render the federal government powerless to protect the nation and lead to a return of the days of the Articles of Confederation.

Those who would offer that argument should note that each resolution specifies that the proposed limitation on income tax

³⁹ Orfield, *op. cit.* note 36, p. 42.

⁴⁰ Wheeler, "Is a Constitutional Convention Impending?" 21 *Ill. L. Rev.* 782, particularly p. 795 (1927).

⁴¹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895).

rates should be subject to the qualification that, "in the event of a war in which the United States is engaged creating a grave national emergency requiring such action to avoid national disaster," the tax limitation may be deferred. If the sub-argument should be made that it would require a "war" to produce a deferment in the tax limitation program and that a "police action" would not be sufficient, the simple answer is that the phraseology is broad enough to include the so-called "police action." As a federal judge once phrased the point, "a formal declaration of war is not necessary before it can be said that a condition of war exists."⁴² The proposed limitation, therefore, appears to have been carefully written and the people, through a convention called for the purpose, should be given a prompt opportunity to pass upon the suggestion.⁴³

⁴² Johnsen, J., in *Verano v. DeAngelis Coal Co.*, 41 F. Supp. 954 (1941), at p. 955.

⁴³ A proposed joint resolution has been submitted to Congress. It was referred to the House Committee on Judiciary on September 13, 1951, but no other action has, as yet, been taken thereon.

NOTES AND COMMENTS

TAKE, THEN PAY; OR PAY, THEN TAKE?

A startling interpretation has been given to Section 13 of Article II of the Illinois Constitution of 1870, one dealing with the power to condemn private property,¹ through the holding of the Illinois Supreme Court in the case of *Department of Public Works and Buildings v. Gorbe*.² The original petition therein, filed by a department of the state government, sought to condemn certain land for highway purposes. It was accompanied by a declaration of taking and a deposit of estimated just compensation pursuant to Section 2a of the Eminent Domain Act,³ one added in 1947. The land owner concerned moved to dismiss, and to enjoin against the taking of the property, on the ground the statute in question was unconstitutional. These motions were denied and the cause was reserved for further proceedings to determine the adequacy of the compensation placed on deposit. On direct appeal from the order denying the motion to dismiss,⁴ the Supreme Court held the statute to be in direct contravention of the state constitution on the ground that that document, as interpreted, forbade the taking of private property prior to the time when the precise amount of compensation to be paid had been determined

¹ That section of the Bill of Rights declares: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law." The section also described the quantum of estate which may be condemned for railroad purposes.

² 409 Ill. 211, 98 N. E. (2d) 730 (1951). The opinion therein had been prepared by the late Mr. Justice Wilson as one of his last official acts prior to his death. It was adopted by the court, which later granted leave to certain *amici curiae*, who had participated in the drafting of the so-called Blighted Vacant Area Development Act of 1949, Ill. Rev. Stat. 1951, Vol. 1, Ch. 67½, § 91.1 et seq., to present a petition for rehearing. Rehearing was, however, later denied.

³ Laws 1947, p. 905; Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, § 2a.

⁴ Direct appeal to the Supreme Court would have been proper, either because a freehold was involved or because interpretation of the state constitution was directly concerned, Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199, but for the fact that the order entered was not of final character. The Eminent Domain Act provides, however, that an order denying a motion to strike a declaration of taking shall constitute an appealable order: Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, § 12. It is worthy of note that, by the last mentioned statute, the appeal must be taken within thirty days from the date of the order. The court, on a showing of excusable delay, granted a petition for leave to appeal filed within fourteen months; Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 200. There is doubt whether the provisions of the Civil Practice Act mentioned would be applicable to eminent domain proceedings, *ibid.*, Ch. 110, § 125, but the brief in support of the petition for rehearing, pages 30-3, notes that the appellants had filed notice of appeal and bond within the thirty-day period, hence jurisdictional requirements were met in apt time. The court, beyond noting the facts mentioned, expressed no comment on this subordinate point.

by an appropriate tribunal and such compensation had, in fact, been paid. By so determining, the court not only struck down the statutory provision in question but also cast doubt on the validity of every attempt to adopt the principle of quick-taking in this state.

The inherent power to condemn property for public use is an aspect of sovereignty which needs no constitutional foundation for its exercise. In the interest of public welfare, such power, or its exercise, should not be trammelled beyond the limit of restraints which the public, as ultimate sovereign, may see fit to impose for the protection of the individual property owner. As the latter ought not be forced to bear alone the expense of a public improvement, it is not remarkable that practically every American constitution,⁵ state as well as federal, conditions the exercise of the eminent domain power by guaranteeing the payment of just compensation for all property taken. The question propounded in the *Gorbe* case, as in all others like it, is narrowed to one concerning the time when payment must be made, whether prior to, simultaneously with, or succeeding the taking.

While each of the three Illinois constitutions have guaranteed that payment would be made to the property owner of just compensation for the property taken from him, no one of these constitutions, by express language, has fixed any period of time within which payment should be made. Early Illinois courts interpreted this fact, in cases arising under the 1848 Constitution, so as not to make payment of compensation a condition precedent to a taking of property,⁶ but the issue has not been quite so clear since the adoption of the Constitution of 1870. That document produced two major changes in the general field; one which required the payment of compensation when property was merely damaged, rather than taken; the other, by prescribing that compensation, when not to be made by the State, should be ascertained by a jury.⁷

Within one year after the adoption of the last-mentioned constitution,

⁵ The constitutions of New Hampshire and North Carolina appear to be the only ones silent on the question of the right to just compensation.

⁶ In *Johnson v. Joliet & Chicago R. R. Co.*, 23 Ill. 124 (1859), at p. 131, the court noted that some constitutions, by precise language, required that compensation should precede taking, but that the Illinois Constitution of 1848 was not one of them: Ill. Const. 1848, Art. XIII, § 11. The same statement would have been true as to the first state constitution: Ill. Const. 1818, Art. VIII, § 11. In *People ex rel. South Park Commissioners v. Williams*, 51 Ill. 63 (1869), the court appeared to have confused constitutional with statutory language. It returned to the original view in the case of *Cook v. South Park Commissioners*, 61 Ill. 115 (1871), and refused to disturb the state of the law when, in *Townsend v. Chicago & Alton R. R. Co.*, 91 Ill. 545 (1879), decided nine years after the 1848 Constitution had been superseded but in a case based on that constitution, it sustained proceedings for the taking of land before payment had been made.

⁷ See Ill. Const. 1870, Art. II, § 13. The provision also, for the first time, limited the nature of the estate which could be condemned for railroad purposes.

the Illinois Supreme Court was called upon to construe the current limitation in the case of *People ex rel. Decatur & State Line Railway Company v. McRoberts*.⁸ Actually, the question propounded was one as to whether or not, in private condemnation proceedings, the trial judge should be ordered, by writ of mandamus, to appoint commissioners to fix the property value, the method previously followed, or should submit the issue to a jury trial. In the course of its opinion, however, the court saw fit to express its belief as to the new procedure to be followed by saying: "The compensation for property damaged as well as taken, must be ascertained by a jury. It can neither be damaged nor taken without compensation; and it follows, as a necessary sequence, that there can be no entrance upon, or possession of, land for public use, until compensation for land damaged, as well as taken, *has been paid*."⁹ Later cases, without critical evaluation of the holding or of the language of the *McRoberts* case, have added strength to the principle that there can be no taking before payment,¹⁰ but in only three instances, prior to the present one, was any issue in fact made regarding the time when compensation had to be made.

The first real consideration of the point came in the case of *Caldwell v. Highway Commissioners*,¹¹ an action to restrain the opening of a road across plaintiff's land until payment had been made for the right of way. The suit was defended on the ground that plaintiff had been tendered payment in the form of certain non-interest bearing orders payable out of a tax to be levied and collected in the future. The court seemingly considered the security of the land owner in the ultimate collection of his compensation as being important. In that regard, it said: "Courts have held that where no time is specified for payment and the State undertakes the payment of compensation, it is not necessary that the payment should precede the use of the property, and perhaps that doctrine is sustainable on the ground that the public faith is of such a character and so pledged to the performance of the obligations of the State as to amount to payment."¹² With reference to the case before it, however, it declared there was "no good ground for extending such a rule to towns and local municipalities for whose obligations the State assumes no liability."

⁸ 62 Ill. 38 (1871).

⁹ 62 Ill. 38 at 43. Italics added. That such statement was *obiter dictum* is not open to doubt.

¹⁰ *City of Chicago v. McCausland*, 379 Ill. 602, 41 N. E. (2d) 745 (1942); *People ex rel. O'Meara v. Smith*, 374 Ill. 286, 29 N. E. (2d) 274 (1940); *South Park Commissioners v. Dunlevy*, 91 Ill. 49 (1878); *City of Chicago v. Barbican*, 80 Ill. 482 (1875); *Mitchell v. I. & St. L. R. R. & C. Co.*, 68 Ill. 236 (1873). It should be noted that these cases all concerned activity by lesser political subdivisions of the state or by private corporations.

¹¹ 249 Ill. 366, 94 N. E. 490 (1911).

¹² 249 Ill. 366 at 373, 94 N. E. 490 at 493.

The case of *Moore v. Gar Creek Drainage District*¹³ also turned on the failure of the public agency to furnish the land owner with security adequate to guarantee payment of the amount eventually to be fixed as just compensation. In the most recent of the three decisions prior to the one in the Gorge case, that announced in the case of *People ex rel. Hesterman v. Smart*,¹⁴ there would seem to be a basis for an inference that, if the state were to furnish adequate security for payment of compensation, legislative adoption of the quick-taking principle might have been sustained.

Explanation for certain of the holdings under the 1870 Constitution might well lie on the foundation that, except as to the state government, the property owner has no adequate assurance, other than by withholding his property, that the local municipal or private corporation exercising the power of eminent domain will pay compensation. Further regard for the property owner's welfare would seem evidenced, again except as to the state government, in the mandatory requirement that the amount of compensation "shall be ascertained by a jury" as prescribed by law.¹⁵ These reasonable precautions might well bespeak an application of the principle of no taking before compensation to lesser governmental units, even in the absence of constitutional mandate on the point. Does it follow, however, that the same arguments prevail against the state government itself?

When the present constitutional provision was under consideration in 1870, four different resolutions were offered to the constitutional convention, three of which proposed to require that compensation should be fixed and be paid before the taking of property occurred.¹⁶ Without accepting the phraseology of either of these suggestions, the Bill of Rights Committee, to which committee these resolutions had been referred, reported a recommendation for the passage of a provision identical with the present Section 13 of Article II of the 1870 Constitution.¹⁷ Most of

¹³ 266 Ill. 339, 107 N. E. 642 (1915).

¹⁴ 333 Ill. 135, 164 N. E. 171 (1928).

¹⁵ Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, §§ 7, 8 and 9, deal with jury trial in eminent domain proceedings.

¹⁶ See Debates and Proceedings, Ill. Const. Conv. 1870, Vol. 1, pp. 88, 93, 155 and 858. The resolution of Charles Wheaton, offered December 20, 1869, among other things, declared that "in all other cases whatever . . . a compensation therefor shall first be made in money, or first secured by a deposit of money." Ibid., Vol. 1, p. 88. That of John C. Haines, offered on January 10, 1870, was to the effect that "private property shall not be taken or applied to public use without the value thereof shall be first ascertained by a jury, and compensation therefor is first made in money." Ibid., Vol. 1, p. 155. The resolution of Henry J. Atkins, offered February 25, 1870, called for "just compensation therefor being first made to the owner of the same, to be determined by a jury in all cases." Ibid., Vol. 1, p. 858. The fourth resolution was intended to deal solely with the appropriation of property to the use of private corporations: Ibid., Vol. 1, p. 93.

¹⁷ Ibid., Vol. 2, p. 1440.

the debate over this recommendation turned on the question as to whether or not the requirement as to jury trial should not also be made mandatory in state cases. Certain of the speakers, who must presumably have reflected the sentiment of the convention, when discussing this issue, touched on the desirability of the state being able to act without the delay which would be caused by requiring it to submit first to trial by jury.¹⁸ In fact, the speaker most concerned with requiring that all determinations regarding compensation be made by a jury expressed the belief that it was not the "question of the *time when the property shall be taken*, but the question as to how much shall be paid for it, that should be submitted to the jury."¹⁹ Another proponent for a motion to amend the proposed section, Mr. Turner of Stephenson County, admitted that there was nothing in the section which would require that compensation be paid first. It would, according to him, be "sufficient if it is paid afterwards."²⁰

The failure to produce an amendment to the proposed section, together with its subsequent approval as submitted, would certainly tend to indicate that it was the sense of the convention that, so far as the state government was concerned, its only obligation was to pay just compensation, as determined by law, but without any other limitation on its sovereign power to condemn. If further limitation was essential, such as one requiring that payment should precede taking, would not there have been some expression on the point, particularly in view of the text of the resolutions offered to the convention? In fact, does not the lack of any such additional limitation argue against the decision reached in the Gorbie case?

While specific limitations making payment of compensation a condition precedent do exist in eleven of the state constitutions,²¹ certain others of them either do no more than impose a requirement for a security deposit²² or permit of an alternative between payment or deposit.²³ Seven-

¹⁸ Ibid., Vol. 2, p. 1580. Mr. Church, McHenry County, voiced the opinion that if jury trial became a condition precedent to state takings, the state "could not even preserve its own existence." It would, he said, be "embarrassed in procuring a military camp for its soldiers in suppressing rebellion."

¹⁹ Ibid., Vol. 2, p. 1580. Remarks by Mr. Buxton. Italics added.

²⁰ Ibid., Vol. 2, p. 1581.

²¹ Ala. Const. 1901, Art. I, § 23; Ga. Const. 1877, Art. I, § 3(1); Ida. Const. 1890, Art. I, § 14; Ind. Const. 1851, Art. I, § 21; Ky. Const. 1891, § 13; La. Const. 1921, Art. I, § 2; Md. Const. 1867, Art. III, § 40; Miss. Const. 1890, Art. III, § 17; Ore. Const. 1859, Art. I, § 18; So. Car. Const. 1895, Art. I, § 17; So. Dak. Const. 1889, Art. VI, § 13. Both the Indiana and the Oregon constitutions except the state from the requirement that the compensation shall be first "assessed and tendered."

²² Mich. Const. 1909, Art. XIII, § 1, indicates that the just compensation shall be "first made or secured in such manner as shall be prescribed by law."

²³ See Ariz. Const. 1912, Art. II, § 17; Cal. Const. 1879, Art. I, § 14; Colo. Const. 1876, Art. II, § 13; Fla. Const. 1887, Art. XVI, § 29; Iowa Const. 1857, Art. I, § 18; Kas. Const. 1861, Art. XII, § 4; Minn. Const. 1857, Art. I, § 13; Mo. Const.

teen states, including Illinois, by contrast, have done little more than model their eminent domain provisions along the line of the classic wording to be found in the Fifth Amendment to the United States Constitution, which simply reads: ". . . nor shall private property be taken for public use, without just compensation."²⁴ Not one court, other than the Illinois Supreme Court, in these last mentioned jurisdictions has interpreted this fundamental guarantee so as to deny, on constitutional grounds, the right of the condemnor to take possession before payment has been made. Not only has the federal Declaration of Taking Act²⁵ been held to be valid,²⁶ but similar state views have been approved by the United States Supreme Court when challenged under the Fourteenth Amendment,²⁷ provided there has been assurance that the property owner would receive the amount due for just compensation when the same was subsequently ascertained. In that regard, a pledge of the "public faith" has been deemed to be sufficient to support action by the federal or state government,²⁸ although it may not be enough as to lesser governmental units.²⁹

In the light of these holdings, it is difficult to see wherein Section 2a of the Eminent Domain Act³⁰ is, or could be, unconstitutional as applied to the state government. It is limited, in its operation, to the taking of private property by, or in the name of, the State of Illinois. It requires the deposit, in court, of the full amount of the estimated just compensation

1875, Art. II, § 21; Mont. Const. 1889, Art. III, § 14; Nev. Const. 1864, Art. I, § 8; No. Dak. Const. 1889, Art. I, § 14; Ohio Const. 1851, Art. II, § 19; Okla. Const. 1907, Art. II, § 24; Pa. Const. 1874, Art. I, § 10; Tex. Const. 1876, Art. I, § 17; Wash. Const. 1889, Art. I, § 16; West Va. Const. 1872, Art. III, § 9. The Nevada provision excuses the necessity for payment or security "in cases of war, riot, fire, or great public peril," permitting compensation in such instances to be made at a later time. It is the only one which gives any attention to the necessity of acting promptly in an emergency.

²⁴ Ark. Const. 1874, Art. II, § 22; Conn. Const. 1818, Art. I, § 11; Dela. Const. 1897, Art. I, § 8; Ill. Const. 1870, Art. II, § 13; Me. Const. 1820-76, Art. I, § 21; Mass. Const. 1790, Part I, Art. X; Neb. Const. 1875, Art. III, § 21; New Jers. Const. 1844, Art. I, § 16; New Mex. Const. 1912, Art. II, § 20; New York Const. 1895, Art. I, § 7; R. I. Const. 1843, Art. I, § 16; Tenn. Const. 1870, Art. I, § 21; Utah Const. 1895, Art. I, § 22; Vt. Const. 1793, Ch. 1, Art. 2; Va. Const. 1902, Art. I, § 6, and Art. IV, § 58; Wis. Const. 1848, Art. I, § 13; Wyo. Const. 1889, Art. I, §§ 32-3. The Arkansas provision is supplemented by Ark. Const. 1874, Art. XII, § 9, which directs that no property "shall be appropriated to the use of any corporation" until full compensation has been made or secured by a deposit of money.

²⁵ 40 U. S. C. A. § 258a.

²⁶ *City of Oakland v. United States*, 124 F. (2d) 959 (1942), cert. den. 316 U. S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753 (1942).

²⁷ *Bragg v. Weaver*, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919); *Williams v. Parker*, 188 U. S. 491, 23 S. Ct. 440, 47 L. Ed. 559 (1903); *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 18 S. Ct. 445, 42 L. Ed. 853 (1898); *Sweet v. Rechel*, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188 (1895).

²⁸ *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 32 S. Ct. 488, 56 L. Ed. 771 (1912).

²⁹ *Caldwell v. Highway Commissioners*, 249 Ill. 366, 94 N. E. 490 (1911).

³⁰ Ill. Rev. Stat. 1951, Vol. 1, Ch. 47, § 2a.

before taking is to occur. It permits the property owner to withdraw such deposit promptly without prejudice to the further right to question the adequacy of the compensation. It authorizes the court to enter judgment against the state in the event the sum of just compensation is ultimately decided to be in excess of the amount deposited. It authorizes appeal to the highest court in the state. It even provides for the return of the property, with damages, in the event it be later determined that the taking was not for a proper public use. All in all, there would seem to be ample protection under the statute for even the most captious property owner.³¹ Nevertheless, the statute has now been stricken down under circumstances which would tend to indicate that no amount of legislative legerdemain could ever revive it, not even in altered form.

The matter has now become but a further illustration of the need for extensive constitutional revision. It is unthinkable that a sovereign state should be denied the power, in the gravest moment of emergency, to act promptly to protect itself and all of its citizens; that it should be required to wait out the law's delays before taking over what might be the very thing needed to preserve all of society. If Illinois is to remain so disabled, it would be a second-class state indeed.

R. H. MATHISEN

THE VALIDITY OF "NOT FOR PROFIT" LOTTERIES

Mankind has pondered for many centuries over the problem as to whether criminal acts become lawful if done from pure motives. That problem has again been brought to the forefront by an Ohio *nisi prius* decision in the case of *Jamestown Lions Club v. Smith*.¹ The plaintiff there, an association which admittedly expended its funds for charitable purposes and public benefit causes, sought a declaratory judgment to the effect that its conduct in the operation of bingo and similar games of chance, to raise funds to support its charities, was not subject to order

³¹ If any criticism at all could be addressed to the fairness of the statute, it might arise from the fact that there is no provision for the payment of interest on any deficiency in the amount of the deposit for the period between the time of taking and the date of the judgment as to such deficiency. Interest for a delay in payment after judgment would be covered by Ill. Rev. Stat. 1951, Vol. 1, Ch. 74, § 3. It is doubted that Section 2 thereof, dealing with interest on money claims, would be applicable to the interim period as it is unlikely that a court would find an "unreasonable and vexatious delay" in making up the deficiency. The court, in the *Gorbe* case, made no point in this connection, being content to base its decision solely on the interpretation given to the constitutional phraseology. Framers of any future statute might wish to keep this point in mind for, to the extent of the deficiency, the condemnor has had the use of another's property without making payment, either in the form of rent for the land or interest for the use of the money.

¹ 100 N. E. (2d) 540 (Ohio Com. Pl., 1951).

of discontinuance at the command of the local sheriff and prosecutor, backed up with a threat of prosecution for violation of law.

It appeared that a provision of the Ohio Constitution declared that lotteries, and the sale of lottery tickets, "for any purpose whatever, shall forever be prohibited in this state,"² but that an Ohio statute penalizing the offense of operating a lottery was presently directed only at a person who "for his own profit" operated such a gambling scheme.³ On the basis of that statute, the *nisi prius* judge declared that it was the right of the plaintiff to operate as it did and directed the public officials to cease their interference.⁴ He purported to find justification for that holding on the basis that the statute in question had been declared constitutional in the case of *State v. Parker*,⁵ but it is doubted if that case,⁶ or the general law on the subject, will support that view.

Approaching the subject of the non-commercial operation of lotteries from the constitutional standpoint, it may first be noted that thirty-seven states have constitutional provisions dealing with the subjects of lotteries and gambling.⁷ The mere presence of such provisions, however, is not

² Ohio Const. 1851, Art. 15, § 6.

³ Ohio Gen. Code, § 13064. The statute had originally been all-inclusive. It was amended, on September 21, 1943, by inserting the phrase "for his own profit," so as to make the statute now read: "Whoever, for his own profit, establishes . . . a lottery or scheme of chance, by whatever name, style or title denominated or known . . . shall be fined . . . and imprisoned not less than ten days nor more than six months."

⁴ The judge, in passing, remarked that "when bingo and other games of chance are conducted by clubs, lodges, societies or churches for the benefit of charitable purposes and public benefit causes, they do no harm; in fact, they may do a great deal of good; and if some of the people who are so exercised in stopping church bingo games were as much exercised in bringing peace to the world they might accomplish something." See 100 N. E. (2d) 540 at 542. Others would not appear to agree. See, in particular, Stevenson, "Home Rule on the Run," 40 Ill. B. J. 154 (1951), particularly 157, and see also *In re Wall*, 407 Ill. 484, 95 N. E. (2d) 375 (1950), where a state's attorney was suspended from practice for tolerating gambling in his county.

⁵ 150 Ohio St. 22, 80 N. E. (2d) 490 (1948).

⁶ The case actually involved the validity of an indictment, against a demurrer by a defendant, which failed to charge that defendant came within the proviso of the statute. As to the necessity of so pleading, see *People ex rel. Courtney v. Prystalski*, 358 Ill. 198, 192 N. E. 908 (1934).

⁷ Ala. Const. 1901, Art. 4, § 65; Ark. Const. 1874, Art. 19, § 14; Cal. Const. 1879, Art. 4, § 26; Colo. Const. 1876, Art. 18, § 2; Dela. Const. 1897, Art. 2, § 17; Fla. Const. 1887, Art. 3, § 23; Ga. Const. 1877, Art. 1, § 2(4); Ida. Const. 1890, Art. 3, § 20; Ill. Const. 1870, Art. 4, § 27; Ind. Const. 1851, Art. 15, § 8; Iowa Const. 1857, Art. 3, § 28; Kan. Const. 1861, Art. 15, § 3; Ky. Const. 1891, § 226; La. Const. 1921, Art. 19, § 8; Md. Const. 1867, Art. 3, § 36; Mich. Const. 1909, Art. 5, § 33; Minn. Const. 1857, Art. 4, § 31; Miss. Const. 1890, Art. 4, § 98; Mo. Const. 1875, Art. 14, § 10; Mont. Const. 1889, Art. 19, § 2; Neb. Const. 1875, Art. 3, § 24; Nev. Const. 1864, Art. 4, § 24; N. J. Const. 1844, Art. 4, § 7(2); N. Y. Const. 1895, Art. 1, § 9; N. D. Const. 1889, Art. 2, § 70a; Ohio Const. 1851, Art. 15, § 6; Ore. Const. 1859, Art. 15, § 4; R. I. Const. 1843, Art. 4, § 12; S. C. Const. 1895, Art. 17, § 7; S. D. Const. 1889, Art. 3, § 25; Tenn. Const. 1870, Art. 11, § 5; Tex. Const. 1876, Art. 3, § 47; Utah Const. 1895, Art. 6, § 28; Va. Const. 1902, Art. 4, § 60; Wash. Const. 1889, Art. 2, § 24; W. Va. Const. 1872, Art. 6, § 36; Wis. Const. 1848, Art. 4, § 24.

always enough since many of them are not self-executing although they do enunciate a fundamental public policy on the point. Many of these provisions require the passage of implementing legislation, as is true in Ohio, while others operate simply to deprive the legislature of the power to authorize lotteries and the like.⁸ Certainly, any law passed in violation of a prohibition of the type last mentioned would be clearly invalid. One passed in furtherance of the first type would, all other requirements being observed, be not only constitutional but evidence of a desire on the part of the legislature to obey the command placed on them by the people.⁹ If the passage of additional legislation is necessary but not forthcoming, there is little that a court could do to compel action by the legislature for it is well understood that a writ of mandamus would not lie in such a situation.¹⁰ It is when the legislature, pursuant to the command, has acted, either in full or partly so, that questions of judicial cognizance can arise. Such is the Ohio situation.

The court in the instant case, having observed that the provision in the Ohio Constitution was not self-executing, then considered whether the legislature had acted to provide, by law, for its implementation. In that regard, it indicated that the statute in question was not one which purported to authorize the operation of a lottery, for that would clearly be unconstitutional, but rather was one under which the legislature had selected only one class of persons, to-wit: "commercial" gamblers, for punishment without providing any regulation whatever applicable to other classes. On that score, the statute was said to be inapplicable to the case before the court.¹¹ That reasoning is faulty in two respects. It is first open to objection on the ground of its negative approach. The legislature, by condemning the acts of but a few, could well be said, tacitly at least, to be approving the same acts when done by others so as, in fact, to be authorizing certain, if not all, lottery operations. In the second place, the reasoning does not square with that constitutional doctrine which declares that laws creating different classes of persons for varying

⁸ Ill. Const. 1870, Art. 4, § 27, is two-fold in character. It declares that the "general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State."

⁹ There is no doubt that the original Ohio statute, prior to its amendment, was of that character.

¹⁰ *Greenwood Cemetery Land Co. v. Roulit*, 17 Colo. 156, 28 P. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284 (1892); *Fergus v. Marks*, 321 Ill. 10, 152 N. E. 557, 46 A. L. R. 960 (1926); *People ex rel. Billings v. Bissell*, 19 Ill. 229, 69 Am. Dec. 591 (1857).

¹¹ In *State v. Lloyd*, 16 Ohio Supp. 15 (1944), the court was asked to pass on the question of the unreasonableness of the classification but did not as the defendant was charged under another section held to be severable from the section here under discussion.

purposes are to be deemed valid only provided the classification schemes found therein are based on reasonable grounds.¹²

Certainly, if any legislative purpose is evident in the Ohio statute, it was to draw a distinction between commercialized lotteries on the one hand and those operated for charitable, or not for profit, purposes on the other. It has been said, however, that that very form of distinction, *i.e.* one classifying lotteries on the basis of whether or not they are to be operated for charitable purposes, is one of unreasonable character, hence unconstitutional.¹³ One can only conclude, therefore, that the Ohio court was clearly wrong in attaining the result it did, for it would have no right, in the face of constitutional condemnation of lotteries "for any purpose whatever," to determine whether some lotteries might be socially desirable.¹⁴

Of more concern is the state of the law on the point in Illinois. The constitutional provision in this state not only denies to the legislature the power to authorize lotteries but is emphatic on the point that the legislature "shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State."¹⁵ There has been no occasion for any Illinois reviewing court to provide interpretation for this provision or to settle the question as to whether it is self-executing or not, but if persuasive authority from other jurisdictions were to be accepted, it would probably be held not to be self-executing for provisions containing similar verbiage elsewhere have been so construed.¹⁶ For that matter, general principles of constitutional construction¹⁷ should lead to that result as it is clear that the section is not complete as it makes no rules for its enforcement nor does it fix the nature of the punishment to be imposed on violators.¹⁸

¹² *United States v. Burnison*, 339 U. S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950); *People ex rel. Curran v. Wood*, 391 Ill. 237, 62 N. E. (2d) 809, 161 A. L. R. 718 (1945); *State v. Norval Hotel Co.*, 103 Ohio St. 361, 133 N. E. 75, 19 A. L. R. 637 (1921).

¹³ *Seattle v. Chin Let*, 19 Wash. 38, 52 P. 334 (1898); *State ex rel. Trampe v. Multerer*, 234 Wis. 50, 289 N. W. 600 (1940).

¹⁴ An interesting statement relating to a constitutional prohibition against both lottery and gambling may be found in *People ex rel. Sturgis v. Fallon*, 152 N. Y. 1 at 11, 46 N. E. 302 at 305, 37 L. R. A. 419 at 422 (1897). Pointing to the extent of the power of the legislature to render the ban harmless by discriminatory legislation, the court said: "While, under that provision, the legislature would have no power to enact laws permitting those offenses, or *which in terms protected persons guilty of them from punishment*, yet where . . . the act is forbidden by the legislature . . . the determination of the degree of punishment or the extent of the penalty is vested in the legislature and not in the courts." Italics added.

¹⁵ Ill. Const. 1870, Art. 4, § 27.

¹⁶ *State v. Mustachia*, 152 La. 882, 94 So. 408 (1922); *State v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. (2d) 689 (1942); *Beach v. Queens County Jockey Club*, 164 Misc. 363, 298 N. Y. S. 777 (1937).

¹⁷ 16 C. J. S., Constitutional Law, § 48, p. 96.

¹⁸ *Cooley*, Const. Lim., Vol. 1, p. 167.

It is, moreover, addressed to the legislative rather than to the judicial department, being placed in the article dealing with the former.¹⁹

Assuming, for the moment, that the Illinois provision is not self-executing,²⁰ it is necessary to see what the legislature may have done to provide reinforcement. Adequate legislation presently exists on the subject²¹ and, unlike the Ohio statute in question, there is, at the moment, nothing in the statute indicating any design to draw any distinction between "commercialized" lotteries and those operated for charitable purposes. It is not urged that any such distinction should be drawn. In fact, as indicated above, it is not believed one could be made in constitutional fashion.²² But there has been agitation for the non-enforcement of law against "charity" gambling schemes, when conducted by churches, lodges, veterans' organizations and the like, in contrast to the agitation for law enforcement against "syndicate" or commercialized gambling.²³ That very agitation may induce the legislature to consider the enactment of some form of amendment, or complete abolition of all statute law, on the subject. If it should so contemplate, it should remember that the social evil inherent in lotteries, provocative of the constitutional ban, is not in any way diminished by reason of the fact that the nickels and dimes of the poor are channelled into "charitable" pockets instead of into those belonging to persons who operate such schemes for profit. A lottery is still an objectionable form of gambling, no matter by whom operated.

If the legislature, by repeal, should think fit to deprive the state of the protection of police measures on the subject, the courts would be powerless, by mandamus, to compel legislative respect for the mandate to be found in the Illinois Constitution.²⁴ Courts would not, however, be without power to suppress the evil for courts of equity could act to enjoin the conduct of lotteries on the ground they amounted to public nuisances.²⁵ Nuisances of that character violate the public right "by a direct en-

¹⁹ It has been suggested that one test, by which to determine if a constitutional provision is, or is not, self-executing, is its location in the fundamental document; *State v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. (2d) 689 (1942); *Broderick v. Weinsier*, 161 Misc. 820, 293 N. Y. S. 889 (1937).

²⁰ Even if it be not self-executing, it is also the rule that a prohibitory provision is sufficiently self-executing that anything done in violation of it is void: *Washingtonian Home of Chicago v. Chicago*, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798 (1895); *Wren v. Dixon*, 40 Nev. 170, 161 P. 722 (1916).

²¹ Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, §§ 406-414.

²² See cases cited in note 13, ante.

²³ See, for example, Baker, "Taxation: Potential Destroyer of Crime," 29 CHICAGO-KENT LAW REVIEW 197-227 (1951).

²⁴ See cases cited in note 10, ante.

²⁵ For a discussion of the power of a court of equity to enjoin gambling as a public nuisance, see Baker, "An Equitable Remedy to Combat Gambling in Illinois," 28 CHICAGO-KENT LAW REVIEW 287-303 (1950).

croachment . . . or by doing some act which tends to a common injury.''²⁶ Without question, a lottery would be a public nuisance for, as the United States Supreme Court once said, it "infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."'²⁷ There would, then, be inherent power in an equity court to protect the community from such a scourge,²⁸ particularly in view of the public policy enunciated in the constitution.²⁹ It is unlikely, therefore, that the state would be without protection of a sort. It would, however, be better if the legislature gave no heed to requests for the drawing of invidious distinctions but left the present statute unchanged.

There is occasion to notice, while on the subject of lotteries, that the ban in the Illinois Constitution is restricted in character and does not forbid all types of gambling. At present, another Illinois statute makes it criminal to engage in other forms of gambling transactions, such as betting on cards, dice or billiard games, through the sale of grain futures, by wagers or pools on athletic contests, by means of bucket-shop operations, through the use of slot or similar machines, and the like.³⁰ It has been said, with regard to such operations, that the "whole subject of gaming is under legislative control in the exercise of the police power, which gives control over those things which may be injurious to the public welfare."³¹ Such being the case, there is the possibility that the legislature, possessed of the power to exercise, or refrain from exercising, the police authority, may see fit to repeal or to amend existing laws in that area so as to permit of some forms of gambling operations by favored classes of persons while prohibiting them as to others.³²

²⁶ *Chicago v. Shaynin*, 258 Ill. 69 at 71, 101 N. E. 224 at 225, 45 L. R. A. (N. S.) 23 (1913).

²⁷ *Phalen v. Virginia*, 49 U. S. (8 How.) 163 at 168, 12 L. Ed. 1030 at 1033 (1850).

²⁸ Legislative definition of those acts which constitute public nuisances, as for example in Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 466, does not exclude the possibility of there being common law nuisances not enumerated therein: *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994, Ann. Cas. 1916D 785 (1915).

²⁹ See, for example, *Iris Amusement Corp. v. Kelly*, 366 Ill. 256 at 261, 8 N. E. (2d) 648 at 650 (1937); *Jones v. Smith Oil Co.*, 295 Ill. App. 519, 15 N. E. (2d) 42 (1938).

³⁰ Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, §§ 324-348.

³¹ *Pelouze v. Slaughter*, 241 Ill. 215 at 227, 89 N. E. 259 at 263 (1909).

³² It has, in fact, done so in the case of pari-mutuel betting on horse races, under Ill. Rev. Stat. 1951, Vol. 1, Ch. 8, § 37a et seq., and as to harness racing, *ibid.*, Ch. 38, § 37s et seq. The constitutionality thereof has been approved in *People v. Monroe*, 349 Ill. 270, 182 N. E. 439, 85 A. L. R. 605 (1932). For cases from other jurisdictions reaching similar results, see *Lee v. City of Miami*, 121 Fla. 93, 163 So. 486, 101 A. L. R. 1115 (1935); *Commonwealth v. Kentucky Jockey Club*, 292 Ky. 531, 38 S. W. (2d) 987 (1931); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 P. 1016 (1926).

Except as such amendments might be stricken down because of unreasonableness in the scheme of classification, the people of the state would seem to have left themselves unprotected against legislation of that character at the hands of a legislature so inclined. It goes without saying that if a lottery is a social evil, no matter by whom conducted, then other forms of gambling are no less of a social evil, for what is inherently bad in the one is no less so in the other. Against the possibility that the people of Illinois have protected themselves only by halves, there would seem to be urgent need to revise the constitutional provision so as to turn it into a total ban on all forms of gambling.

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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—OFFENSES AND PROSECUTIONS—WHETHER A PERSON WHO DRIVES AN AUTOMOBILE WITH KNOWLEDGE OF POSSIBILITY OF SEIZURE LIKELY TO CAUSE LOSS OF CONSCIOUSNESS MAY BE CONVICTED FOR STATUTORY OFFENSE OF RECKLESS HOMICIDE BECAUSE HE CAUSES DEATH OF ANOTHER DURING A PERIOD OF UNCONSCIOUS DRIVING—In the recent New Jersey case of *State v. Gooze*,¹ the defendant was tried and convicted on a charge of violating a state statute which penalizes the conduct of a person who causes the death of another while driving a vehicle carelessly

¹ 14 N. J. Super. 277, 81 A. (2d) 811 (1951). Bigelow, J., wrote a dissenting opinion.

or heedlessly or in wilful and wanton disregard for the rights and safety of others.² Approximately one year prior to the accident in question, defendant had an attack of a disease characterized as Meniere's Syndrome which, for all practical purposes, possesses the same characteristics as that of epilepsy.³ Following that attack, the defendant visited a physician, was advised that he might suffer a recurrence of the disease, and was told that, if he continued to drive an automobile, he should not drive alone. The evidence in the case also tended to show that just prior to the collision between the defendant's car and the automobile of the deceased, defendant's car was approaching from the opposite direction on the wrong side of the road, with defendant slumped beneath the steering wheel suffering from a recurrence of the earlier disease. It also appeared that, prior to the collision, defendant had had only the one attack of the malady, being the one a year earlier, and had resumed his regular work as foreman in a trucking office. On appeal by the defendant to the Superior Court of New Jersey, Appellate Division, that court affirmed the conviction, basing the decision on the interpretation it gave to the state statute as applied to the defendant's conduct.

At first glance, it might be supposed that the factual situation thus presented would be one which the courts would have thoroughly covered, for literally thousands of criminal prosecutions have been predicated upon the negligent or reckless acts of automobile drivers. Search through the statutes of the American jurisdictions does reveal that at least twenty-five of them have enacted some form of "negligent or reckless homicide" statute in order to deal with the increasing number of deaths arising from negligent or reckless operation of automobiles.⁴ More revealing, however, is the fact that, while many cases have been decided under these statutes,

² N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9.

³ Both conditions cause dizziness to such a degree that persons afflicted frequently "black out" for varying periods of time.

⁴ Ark. Stat. Ann. 1947, Ch. 10, § 75—1001; Cal. Deering Pen. Code Ann. 1949, Ch. 1, § 192; Colo. Stat. Ann. 1935, Vol. 2, Ch. 48, § 39; Conn. Rev. Stat. 1949, Tit. 17, Ch. 110, § 2415; D. C. Code 1949, Tit. 40, Ch. 6, § 40—606; Fla. Stats. 1941, Tit. 44, Ch. 860, § 860.01; Ida. Code 1949, § 18—4006; Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 364a; Burns' Ind. Stat. Ann., 1949 Supp., Vol. 8, Ch. 2, § 47—200; Kan. Stat. Ann., 1947 Supp., Ch. 8, Art. 5, § 8—529; La. Dart Crim. Code 1943, Tit. 2, Ch. 1, Art. 740—32; Flack Md. Code Ann., 1947 Supp., Art. 27, § 436a; Mich. Stat. Ann., 1949 Supp., Ch. 286a, § 28.556; Minn. Stat. 1945, § 169.11; N. H. Rev. Laws 1942, Ch. 118, § 12; N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9; McKinney's N. Y. Cons. Laws Ann. 1943, Penal Law, Art. 94, § 1053a; Page's Ohio Gen. Code Ann., 1949 Supp., § 12404; Ore. Comp. Laws 1943, Ch. 4, § 23—410a; S. C. Code 1942, Ch. 78, Art. 1616, § 29; Vernon's Tex. Penal Code 1936, Arts. 1230—43; Vt. Stats. 1947, Tit. 47, Ch. 435, § 10,286; Remington's Wash. Rev. Stat. Ann., 1941 Supp., Tit. 4, Ch. 9, § 6360—120; Wis. Stats. 1947, Ch. 340, § 340.271; Wyo. Comp. Stats. Ann. 1945, Ch. 60, § 60—413.

none up to the present time has directly dealt with the point here under discussion,⁵ *i.e.* whether the defendant must be conscious at the time he drives negligently or recklessly.

Statutes of the kind in question are of a criminal nature,⁶ so it is necessary, in order to convict an accused person of criminal negligence, that the negligence must be something more than, or greater in degree than, the negligence which would be sufficient to impose civil liability.⁷ As stated in the New Jersey statute, it is customarily necessary to make a showing that the defendant drove his automobile "carelessly and heedlessly in a wilful and wanton disregard of the rights or safety of others" at the time he causes the death of another. The sole question, then, in a case like the instant one, is whether the conduct of the defendant, driving a car under the facts previously stated, could be said to constitute a wilful or wanton disregard of the rights or safety of others.

Courts are, practically speaking, in unanimous agreement that there is a distinction between wilful conduct on the one hand and wanton negligence on the other. To constitute wilfulness there must be design, purpose, or intent to do wrong and inflict injury; to constitute wanton negligence, the party acting, or failing to act when he should, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.⁸ Admitting that the evidence in the instant case failed to disclose wilfulness, the court expressed the belief that the defendant, in undertaking to drive his car at the time he did, was acting wantonly. It reached that conclusion on the basis that defendant knew, from his knowledge of the sur-

⁵ No decisions based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 364a, appear in the appellate reports of the state, perhaps because the statute is too recent. It was enacted in 1949: Laws 1949, p. 716. The Illinois statute provides: "Any person who drives a vehicle *with reckless disregard* for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide." Italics added. It should be compared closely with the New Jersey statute set out in note 6, post.

⁶ N. J. Stat. Ann., 1949 Supp., Ch. 138, § 2:138—9, declares: "Any person who shall cause the death of another by driving any vehicle carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others shall be guilty of a misdemeanor; but it shall be unlawful to use or offer in evidence the record of any judgment obtained hereunder in any civil action brought to recover damages arising out of the accident in which such death occurred."

⁷ State v. Allison, 122 Mont. 120, 199 P. (2d) 279 (1948); State v. Powell, 114 Mont. 571, 138 P. (2d) 949 (1943); Hiller v. State, 164 Tenn. 388, 50 S. W. (2d) 225, 99 A. L. R. 829 (1932); Copeland v. State, 154 Tenn. 7, 285 S. W. 565, 49 A. L. R. 605 (1926); State v. Whatley, 210 Wis. 157, 245 N. W. 93, 99 A. L. R. 749 (1932); State v. McComb, 33 Wyo. 346, 230 P. 526, 41 A. L. R. 717 (1925).

⁸ Birmingham Ry., Light & Power Co. v. Norton, 7 Ala. App. 571, 61 So. 459 (1913); Rogers v. Doody, 119 Conn. 532, 178 A. 51 (1935); Richardson v. Pollard, 57 Ga. App. 777, 196 S. E. 199 (1938); Jefferson v. King, 12 La. App. 249, 124 So. 589 (1929); Crossman v. Southern Pac. Co., 44 Nev. 286, 194 P. 839 (1921); Barkley v. State, 165 Tenn. 309, 54 S. W. (2d) 944 (1932).

rounding circumstances and existing conditions, that his conduct would naturally or probably result in injury.⁹ It is submitted that such a conclusion seems to have been achieved without logical foundation. Taking into consideration the fact that the defendant had had a seizure about a year prior to the accident, it was reasonably foreseeable that (1) if he drove his car subsequently, and (2) if he had another seizure while so driving, the probable consequence might well be injury or death to others, but in order to find that the defendant's conduct was wanton it would be necessary to demonstrate that he could have foreseen the possibility of another seizure as well as the resultant injury or death of another.

Lacking cases directly in point on which to base a decision, the New Jersey court relied heavily on the analogy which it drew from cases involving drivers who fell asleep while driving. Cases of that character support the conclusion that an automobile driver who has driven while asleep and has killed another is not guilty of negligent homicide unless it could be said that he had such warning of the possibility of falling asleep that, under all the circumstances, he could be said to drive recklessly or in marked disregard of the safety of others when not heeding the warning he had received.¹⁰ Therein lies an important distinction. The defendant in each such case knew, or should have known, that he might fall asleep by reason of the premonitory symptoms which had become apparent to the defendant shortly before the accident. In the instant case, the defendant had, at one time, been put on notice that he might suffer a recurrence of the malady but that had been almost a year prior to the accident. The interval of time was much greater than in the sleep cases and, during that interval, the defendant had (1) suffered no subsequent attacks, (2) had resumed his normal occupation, and (3) had no warning, when he drove his car as he did, that another attack was in the offing. Can it be said, then, that he had the same type of present knowledge or notice that has been required in the sleep cases?

If the court was looking for analogies, it should have considered either the somnambulism cases, wherein sleep-walkers have been held not guilty of crime for acts done while in that unconscious state,¹¹ or treated the subject on the same basis as would be applied to insane persons. The reckless homicide statutes contemplate a degree of mental intent of a kind or character such as would be required in the case of most crimes. Other offenses would not be satisfied by acts alone. Is it not true, then,

⁹ The court stated that "it was reasonably foreseeable that if he 'blacked out' or became dizzy without warning, its probable consequences might well be injury or death to others." 14 N. J. Super. 277 at 286, 81 A. (2d) 811 at 816.

¹⁰ *People v. Robinson*, 253 Mich. 507, 235 N. W. 236 (1931); *State v. Olsen*, 108 Utah 377, 160 P. (2d) 427, 160 A. L. R. 515 (1945).

¹¹ See, for example, *Fain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213 (1879).

that the unconscious person, for lack of presence of mind, could hardly be said to be acting wittingly at the moment of doing the act which causes the harm? Only if it could be shown, by reason of prior warnings, that his fault lay anterior to the moment of unconsciousness, could it then be said that he was acting negligently or wantonly. If the element of prior warning is removed, the case should collapse.

It would be rank speculation to attempt to predict what an Illinois court would decide on a similar set of facts. Aside from a slight difference in the statute, if analogy could prove useful, for lack of actual precedent, reference might be made to the so-called "guest" statute¹² and the cases decided thereunder wherein Illinois courts have given a concise statement as to what they will consider to be wanton conduct. In *Bartolucci v. Falletti*,¹³ for example, the court said: "Plaintiff's right to recover is, consequently, dependent upon proof that the accident causing the injuries was occasioned by defendant's wilful and wanton misconduct. Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be *conscious* of his conduct, and . . . must be *conscious*, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury."¹⁴ In another non-guest case, that of *Walldren Express & Van Company v. Krug*,¹⁵ the court defined wantonness as implying an act "*intentionally* done in disregard of another's rights, designed and intentional mischief, and not a mere negligent omission of duty."¹⁶ It would, then, seem only remotely possible that an Illinois court would reach the result that conduct of the type found in the instant case would be classed as wanton.

Granted that courts cannot readily categorize various types of conduct to be within the meaning of the word wanton while treating other types as being beyond the meaning of that word, they should be guided by standards of reasonableness. It hardly seems reasonable that a defendant who has driven his car for a year subsequent to the time when he had had but one fit, with no indication that he is still suffering from the malady, should be regarded as being legally responsible for a wanton act occurring in a moment of unconsciousness. Other persons, such as diabetics or heart patients, may be suddenly stricken unconscious. Would

¹² Ill. Rev. Stat. 1951, Vol. 2, Ch. 95½, § 58a. Civil Liability is imposed only if the driver has been guilty of "wilful and wanton misconduct." The phrase is similar to the one used in the New Jersey statute set out in note 6, ante, but differs from the wording of the Illinois "reckless homicide" statute set out in note 5, ante.

¹³ 382 Ill. 168, 46 N. E. (2d) 980 (1947).

¹⁴ 382 Ill. 168 at 174, 46 N. E. (2d) 980 at 983.

¹⁵ 291 Ill. 472, 126 N. E. 97 (1920).

¹⁶ 291 Ill. 472 at 479, 126 N. E. 97 at 99.

a court find such persons guilty, if they were to suffer a heart attack or a diabetic coma and kill while driving a car, upon a showing that only one such attack had been suffered over a year prior to the accident? While the instant case, by implication, would seem to sanction an affirmative answer, it is submitted that such a conclusion would obviously be an unreasonable one. If society needs protection from events of that character, it should forbid such persons from driving at all, with suitable penalties simply for engaging in the forbidden act. It should not, for the sake of conviction, warp existing law to postulate a required state of mind in a person known to be unconscious.

D. J. AHERN

BAIL—RIGHT TO BE RELEASED ON BAIL—WHETHER OR NOT A PARTY DETAINED PURSUANT TO A STATUTE PROVIDING FOR THE APPREHENSION AND DETENTION OF SEXUAL PSYCHOPATHS IS ENTITLED TO BAIL PENDING A HEARING TO DETERMINE HIS MENTAL STATUS—In a recent habeas corpus proceeding entitled *Application of Keddy*,¹ a California District Court of Appeals was faced with an issue as to whether or not a person held under a statute providing for the apprehension and detention of sexual psychopaths would be entitled to bail pending a hearing on his mental status. The petitioner had previously been convicted in a California municipal court for several sexual misdemeanors. His motion for a new trial therein had been denied but further proceedings were suspended as the trial court had certified the matter to the Superior Court pursuant to the procedure outlined in the sexual psychopath statute.² The petitioner appeared in that tribunal, two psychiatrists were appointed to examine him, and a date was set for a hearing but petitioner's application for release on bail was denied. He then filed the present application for a writ of habeas corpus, contending that the statute was unconstitutional or, if not, that he was entitled to bail pending a hearing on his mental status. The California District Court of Appeals, while upholding the statute, held that the petitioner was entitled to be at liberty on bail.³

The respondent had argued that, inasmuch as insane persons may be held without bail, the petitioner, being charged as a sexual psychopath,

¹ 105 Cal. App. (2d) 215, 233 P. (2d) 159 (1951). Wilson, J., wrote a dissenting opinion. The decision was followed in *Application of Rice*, 105 Cal. App. (2d) 493, 234 P. (2d) 180 (1951). Wilson, J., again wrote a dissenting opinion.

² Cal. Welfare and Institutions Code, § 5501.

³ Cal. Const. 1879, Art. 1, § 6, states: "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." Cal. Penal Code, § 1272, declares: "After an offense not punishable with death, a defendant who has appealed may be admitted to bail . . . as a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanors."

was in the same category, hence could be held without bail pending the final determination as to whether or not he was a sexual psychopath. The court refused to follow the suggested analogy on the ground that it had previously been decided in California that a sexual psychopath was not an insane person.⁴ It did, however, draw an analogy between the situation before it and statutory proceedings for the apprehension and detention of persons addicted to the use of stimulants⁵ by relying on a case which involved an issue as to the right to bail under that statute. The case of *In re Henley*,⁶ so relied on, had granted bail to one who was being held to determine if he was a drug addict. It was there indicated, however, that bail might be denied if the public safety so demanded, an aspect which the majority of the court in the instant case failed to take into consideration.

While the issue determined in the case at hand has not previously been decided anywhere in the country, many analogous situations exist despite the fact that the California court would have nothing to do with them. The majority based the refusal to use the analogy provided by the insane person situation on the ground that a sexual psychopath was not insane. This would provide a poor reason at best, for an analogy is to be utilized not because two things are exactly alike but rather because they are similar. Proceedings for the apprehension and detention of sexual psychopaths and proceedings for the investigation and commitment of insane persons are similar.⁷ They have the same general purpose, namely to protect the afflicted individual and to protect the health and safety of the public in general. They are both proceedings of a kind separate and distinct from a criminal trial, hence the constitutional guarantees which attach to criminal trials are not applicable thereto.⁸

The Illinois Supreme Court, for example, through the medium of the case of *People v. Sims*,⁹ has stated that the so-called "sexual psychopath" statutes,¹⁰ in operation, are not unlike the proceedings relating to an inquiry into the sanity of one charged with a crime before trial,¹¹ and it

⁴ *People v. Tipton*, 90 Cal. App. (2d) 103, 202 P. (2d) 330 (1949).

⁵ Cal. Political Code, § 2185C.

⁶ 18 Cal. App. 1, 121 P. 933 (1912).

⁷ *People v. Redlich*, 402 Ill. 270, 83 N. E. (2d) 736 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 53. See also *People v. Sims*, 382 Ill. 472, 47 N. E. (2d) 703 (1943); *People v. Chapman*, 301 Mich. 584, 4 N. W. (2d) 18 (1942).

⁸ *Kemmerer v. Benson*, 165 F. (2d) 702 (1948); *Rowan v. People*, 147 F. (2d) 138 (1945); *People v. Redlich*, 402 Ill. 270, 83 N. E. (2d) 736 (1949); *People v. Sims*, 382 Ill. 472, 47 N. E. (2d) 703 (1943); *In re Kemmerer*, 309 Mich. 313, 15 N. W. (2d) 652 (1944); *People v. Chapman*, 301 Mich. 584, 4 N. W. (2d) 18 (1942); *State ex rel. Sweetzer v. Green*, 360 Mo. 1249, 232 S. W. (2d) 897 (1950).

⁹ 382 Ill. 472, 47 N. E. (2d) 703 (1943).

¹⁰ Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, §§ 802—25, and Vol. 2, Ch. 108, § 112.

¹¹ *Ibid.*, Vol. 1, Ch. 38, §§ 592-3.

has been consistent when applying this analogy.¹² It has also held, in *People v. Ross*,¹³ that there is no right, by way of appeal, to secure review after a hearing under the statute for the proceeding is not criminal but statutory and civil in nature. Any right of appeal, therefore, would depend on the statute and, as no right of appeal has been provided for therein, none exists. In that connection, reference has been made to the case of *People v. Cornelius*,¹⁴ one involving similar issues in an insanity proceeding, wherein the right to appeal has been denied on similar grounds. The Supreme Court of Michigan, in *People v. Chapman*,¹⁵ has also stated that proceedings under the sexual psychopath statute of that state are analogous to proceedings for the commitment of persons alleged to be insane. While cases involving the several sexual psychopath statutes are not numerous, they nevertheless do indicate a willingness to draw the analogy rejected in the instant case. If the analogy is appropriate, there is no question but what it is a well established rule that insane persons may be summarily detained without legal process pending a hearing into their mental status, particularly if their being at large would constitute a threat to themselves and to the public.¹⁶ It is also beyond question that such persons may be denied bail pending a hearing, if public safety so demands.¹⁷

Preventive measures of the kind in question are not new to the law. An Illinois statute providing for the detention of parties suspected of

¹² In *People v. Redlich*, 402 Ill. 270, 83 N. E. (2d) 736 (1946), for example, the court considered a refusal to submit to a psychiatric examination of the type intended by Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 823, to be a form of civil contempt warranting detention until the defendant complied with the order for examination. It did, however, void the order because the defendant, without the examination, had been tried and convicted on the primary charge which had produced the sexual psychopath proceeding against him. That conviction was said to render moot all other action in the case.

¹³ Cause transferred for lack of jurisdiction: 407 Ill. 199, 95 N. E. (2d) 61 (1950). The Appellate Court likewise dismissed the appeal: 344 Ill. App. 407, 101 N. E. (2d) 112 (1951).

¹⁴ 332 Ill. App. 271, 74 N. E. (2d) 900 (1947). Direct appeal to the Illinois Supreme Court had been rejected for lack of jurisdiction: 392 Ill. 599, 65 N. E. (2d) 439 (1946). The cause was then transferred to the appropriate Appellate Court.

¹⁵ 301 Mich. 584, 4 N. W. (2d) 18 (1942).

¹⁶ *Porter v. Ritch*, 70 Conn. 235, 39 A. 169 (1898); *People v. Niesman*, 356 Ill. 322, 190 N. E. 668 (1934); *Crawford v. Brown*, 321 Ill. 305, 151 N. E. 911, 45 A. L. R. 1457 (1926); *Maxwell v. Maxwell*, 189 Iowa 7, 177 N. W. 541, 10 A. L. R. 489 (1920); *Babb v. Carlson*, 116 Kan. 690, 229 P. 76 (1924); *In re Dowell*, 169 Mass. 387, 47 N. E. 1033 (1897); *In re Moynihan*, 332 Mo. 1022, 62 S. W. (2d) 410 (1933); *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304 (1880); *In re Cornell*, 111 Vt. 525, 18 A. (2d) 304 (1941).

¹⁷ *Ex Parte Frailey*, 146 Tex. Crim. 557, 177 S. W. (2d) 72 (1944); *Ex parte Crawford*, 134 Tex. Crim. 508, 116 S. W. (2d) 748 (1938); *Ex parte Roark*, 124 Tex. Crim. 374, 61 S. W. (2d) 833 (1933); *Wilson v. State*, 67 Tex. Crim. 369, 149 S. W. 117 (1912).

being afflicted with communicable venereal diseases¹⁸ and a California statute, mentioned by the majority in the principal case, providing for the detention of persons addicted to the use of stimulants,¹⁹ are classic examples of preventive rather than punitive legislation. These statutes, like the sexual psychopath laws, have in mind the prevention, not the punishment, of crime and display a most important concern for the protection of society. Bail has been denied under the Illinois statute mentioned,²⁰ and the California court has indicated that bail might be denied in the narcotics cases if the public safety so demands.²¹

During the past fifteen years, sixteen jurisdictions have passed special provisions for the control of sexual psychopaths.²² They are, as one work on the subject says, "an interesting development of the law in that they extend the concept of mental disorder beyond the ordinary confines of classical insanity or mental defect."²³ While proceedings authorized thereunder may be unique in character, it is clear that such proceedings are not of a criminal but rather of a civil statutory nature.²⁴ It was on that basis that the California court upheld the constitutionality of the statute involved in the instant case. When confronted with the issue of bail, however, it failed to follow the prior holding, treated the case as being one of criminal character, and turned to provisions of the California Constitution and Penal Code pertaining to bail in criminal cases to find support for its ultimate decision. This represents, to say the least, a marked inconsistency in the treatment accorded to the subject. Authority will bear out the first conclusion reached. The court is treading on lonely ground as to the second.

K. CARNAHAN

¹⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 23, § 392.

¹⁹ Cal. Political Code, § 2185C.

²⁰ *People ex rel. Baker v. Strautz*, 386 Ill. 360, 54 N. E. (2d) 441 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 162.

²¹ *In re Henley*, 18 Cal. App. 1, 121 P. 933 (1912).

²² Statutes may now be found in California, District of Columbia, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Vermont, Washington and Wisconsin.

²³ See Weihoffen and Overholser, "Commitment of the Mentally Ill," 24 Tex. L. Rev. 307 (1946), at p. 330.

²⁴ *Malone v. Overholzer*, 93 F. Supp. 647 (1950); *Kemmerer v. Benson*, 165 F. (2d) 702 (1948); *Rowan v. People*, 147 F. (2d) 138 (1945); *People v. Redlich*, 402 Ill. 270, 83 N. E. (2d) 736 (1949); *People v. Sims*, 382 Ill. 472, 47 N. E. (2d) 703 (1943); *People v. Ross*, 344 Ill. App. 407, 101 N. E. (2d) 112 (1951); *In re Kemmerer*, 309 Mich. 313, 15 N. W. (2d) 652 (1944); *People v. Chapman*, 301 Mich. 584, 4 N. W. (2d) 18 (1942); *State ex rel. Sweetzer v. Green*, 360 Mo. 1249, 232 S. W. (2d) 897 (1950); *In re Moulton*, 96 N. H. 370, 77 A. (2d) 26 (1950). Confusion may have been generated by use of the term "criminal sexual psychopath" in relation to these statutes or by the inclusion thereof in criminal codes. They should, more nearly, be classified with laws relating to mental health.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER OR NOT AN ORDINANCE FORBIDDING UNINVITED HOUSE-TO-HOUSE CANVASSING CONTRAVENES CONSTITUTIONAL GUARANTEES OF FREE SPEECH AND FREE PRESS—The Supreme Court of the United States, through the medium of the recent case of *Breard v. City of Alexandria*,¹ had occasion to consider for the first time the contention that guarantees of freedom of speech and of the press would be abridged by ordinances which declare it to be a punishable nuisance for solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise to go in or upon private residences, without prior request or invitation, for the purpose of soliciting orders for the sale of goods, wares and the like. Breard, representing a firm engaged in soliciting subscriptions for nationally known magazines and in charge of a crew of solicitors who spent a few days in each city going from house to house, had been convicted in a city court of Louisiana for the violation of such an ordinance.² On appeal to it, the Louisiana Supreme Court had affirmed that conviction.³ On further appeal, the Supreme Court of the United States also affirmed by holding, among other issues,⁴ that ordinances of the kind in question did not interfere with freedom of speech or of the press because, as the Supreme Court pointed out, only "the press or oral advocates of ideas could urge this point."⁵ The decision serves to establish a line at which the commercial publisher's constitutionally guaranteed freedoms must yield to his status as a businessman, in which capacity he is subject to all reasonable restraints relating to business conduct.⁶

¹ 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), affirming 217 La. 820, 47 So. (2d) 553 (1950). Chief Justice Vinson wrote a dissenting opinion as did Mr. Justice Black. Mr. Justice Douglas concurred in both dissents.

² The material portion of the ordinance read: ". . . the practice of going in and upon private residences . . . by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor." 341 U. S. 622 at 624-5, 71 S. Ct. 920, 95 L. Ed. 1233 at 1238.

³ 217 La. 820, 47 So. (2d) 553 (1950).

⁴ The other issues had included a claim of a denial of due process and a violation of the commerce clause. The court rejected both contentions.

⁵ 341 U. S. 622 at 641, 71 S. Ct. 920, 95 L. Ed. 1233 at 1247.

⁶ The contrast will appear more sharply defined if consideration be given to the fact that, on the one hand stood Breard and his employer, doing an annual business of \$5,000,000 in subscriptions, aligned with the represented magazines whose even larger income from advertising sources was based, at least partly, on the circulation obtained by such efforts. On the other hand stand those decisions referring to freedom of the press, such as *Ex parte Jackson*, 96 U. S. 727 at 733, 24 L. Ed. 877 at 879 (1878), wherein it was said that liberty of "circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value."

The problem of the instant case must be distinguished from several which have been generated under somewhat similar situations. Among these are cases involving regulations adopted by owners of business property designed to restrict or to forbid peddling within the premises;⁷ cases concerning solicitation or distribution of literature, either of a commercial or a religious nature, on the public streets;⁸ cases wherein free distribution of literature, frequently of a religious nature, has occurred on private property;⁹ and cases dealing with the distribution of printed matter, more religious than commercial, on private property but where permissive use has been granted to the public.¹⁰ None of these reach the precise issue here involved, that of the right to engage in commercial solicitation on private property without prior request or invitation.

The case in question revives an interest in those decisions which had upheld convictions based on an ordinance, adopted in 1931, by the Town of Green River, Wyoming,¹¹ for while those cases had involved the activities of salesmen of a well known brush company the conduct prohibited was essentially no different than the acts performed by Breard and his crew in the instant case.¹² The net result of the instant holding, therefore, has been to validate the Green River type of ordinance provided each such ordinance (1) does not tend to make illegal all methods of circulation or solicitation, (2) does not vest arbitrary discretion to permit solicitation in some municipal official, (3) keeps license fees within reasonable bounds, and (4) imposes only such restrictions as are consistent with the maintenance of public order. That conclusion has been attained, however, only as the result of a series of steps.

⁷ *Saxton v. Peoria*, 75 Ill. App. 397 (1898).

⁸ *Valentine v. Chrestenden*, 316 U. S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); *Stephenson v. Binford*, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721 (1932); *Packard v. Banton*, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596 (1924); *Ex parte Mares*, 75 Cal. App. (2d) 798, 171 P. (2d) 762 (1946); *Pittsford v. City of Los Angeles*, 50 Cal. App. (2d) 25, 122 P. (2d) 535 (1942); *City of Chicago v. Rhine*, 363 Ill. 719, 2 N. E. (2d) 905, 105 A. L. R. 1045 (1936); *Slater v. Salt Lake City*, — Utah —, 206 P. (2d) 153, 9 A. L. R. (2d) 712 (1949); *Robert v. Norfolk*, 188 Va. 413, 49 S. E. (2d) 697 (1948).

⁹ *Martin v. Struthers*, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

¹⁰ *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); *Tucker v. Texas*, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946).

¹¹ See *Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (1933), and *Green River v. Bunger*, 50 Wyo. 52, 58 P. (2d) 456 (1936), appeal dismissed 300 U. S. 638, 57 S. Ct. 510, 81 L. Ed. 854 (1937).

¹² In *Breard v. City of Alexandria*, 69 F. Supp. 722 (1947), the present appellant, plaintiff there, unsuccessfully sought to enjoin the city from enforcing the ordinance, quoted in note 2 ante. The district court, pointing to the similarity to be found in the Green River cases, said: "The solicitor in the former visits the private home and has specimens of the articles he seeks to sell and may even give an illustration of their practical use to the housewife. In the latter case, the solicitor exhibits one of the issues of his magazine and seeks to sell a yearly subscription or more, based on its exhibit." 69 F. Supp. 722 at 725. It should be noted that the issue of freedom of the press was not raised therein.

The first step is illustrated by the case of *Lowell v. Griffin*.¹³ The United States Supreme Court there held an ordinance to be invalid on its face which forbade the practice of distributing circulars, handbooks, advertising, or literature of any kind, whether being freely delivered or for sale, without first obtaining written permission, because it pointed out that such an ordinance could be invoked to produce a total prohibition on the distribution of literature of any kind at any time anywhere without a permit.

The second stage, one concerning the amount of discretion which may be left to municipal authorities, proved fatal to the ordinance involved in *Schneider v. Irvington*.¹⁴ Under that ordinance, a permit could be obtained only after an involved registration procedure but which permit was required of all who would canvass, solicit, distribute circulars or other matter, or call from house to house. The court pointed out that the ordinance was not limited to those who canvassed for private profit nor was it the common type of ordinance requiring some form of registration or license of hawkers and peddlers. Because it banned unlicensed communication of any views or the advocacy of any cause from door to door, permitting canvassing only subject to the power of a police officer to determine, as censor, what literature might be distributed, it was deemed to abridge rights concerning freedom of speech and of the press. While the *Schneider* case actually involved the distribution of literature of a religious nature, the element of undue discretion would probably have invalidated the ordinance as applied to a solicitor of subscriptions since the mere fact that money is made out of the distribution does not serve to bar publications from the protection of the First Amendment.¹⁵ Certainly, if issuance of a license becomes a mandatory obligation after registration has occurred, there could be no doubt as to the validity of an ordinance on this score.¹⁶

On the third and fourth points, those dealing with the reasonableness of the license fee and the exercise of the police power, notice should be taken of the Pennsylvania case of *Commonwealth v. Boehmer*.¹⁷ The court there held that an ordinance prohibiting house to house canvassing without a license had a reasonable purpose in that it provided protec-

¹³ 303 U. S. 444, 52 S. Ct. 666, 82 L. Ed. 949 (1938).

¹⁴ 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939). The case operated to reverse convictions obtained under ordinances adopted in California, Massachusetts, New Jersey and Wisconsin.

¹⁵ See *Thomas v. Collins*, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

¹⁶ In *Washburne v. Ellquist*, 242 Wis. 609, 9 N. W. (2d) 121 (1943), an ordinance was held valid, even as to solicitations of a religious character, inasmuch as it vested no controlling or discretionary power in any public official, demanded no tax or fee, and involved no religious test.

¹⁷ 88 Pitts. Leg. J. 178 (1939).

tion against fraud and imposition and did not unlawfully interfere with the rights of free press, speech or religion, but found it invalid, nevertheless, because it called for an unreasonably high license fee, converting the ordinance into a tax rather than a license measure.

While freedom of press, freedom of speech, and freedom of religion occupy the same preferred position under the constitution,¹⁸ courts have tended to grant more freedom to publications of a religious nature, even when sold, than to commercial publications.¹⁹ This should occasion no surprise as the profit arising from the sale of religious publications is usually used for other religious purposes. It does, however, make necessary a careful distinction between the cases. In *Donley v. Colorado Springs*,²⁰ for instance, the court enjoined enforcement of an ordinance prohibiting uninvited canvassing, as applied to a minister selling religious material, because it said the ordinance in question was intended for the protection of local merchants and other business interests as against itinerant salesmen and solicitors who, not being members of the community or permanent residents, paid no taxes, had no interest in the local government, and contributed nothing to its support. The court considered it to be a forced and strained construction to attempt to include ministers of a duly recognized religious sect, sincerely engaged in the exercise of their faith in the manner thought best by them, within the scope of the ordinance.²¹ It cited the Illinois case of *Village of South Holland v. Stein*²² in support of this argument but, while that case involved both the sale of subscriptions to a religious periodical and the free distribution of pamphlets, it was only the limitation on the free distribution which was held unconstitutional.

Turning to the question as to whether or not it would be possible to enact the Green River type of ordinance in Illinois, it should first be noticed that the municipalities of the state clearly lack authority to regulate the solicitation of subscriptions to periodicals. The applicable section of the Cities and Villages Act grants corporate authorities the power to "license, tax, regulate or prohibit hawkers, peddlers . . . itinerant mer-

¹⁸ *Robert v. Norfolk*, 188 Va. 413, 49 S. E. (2d) 697 (1948).

¹⁹ *Jones v. City of Opelika*, 241 Ala. 279, 3 So. (2d) 76 (1941), cert. dis. 315 U. S. 782, 62 S. Ct. 630, 86 L. Ed. 1189, rehear. granted and judgment reversed 316 U. S. 649, 62 S. Ct. 1312, 86 L. Ed. 1691 (1942).

²⁰ 40 F. Supp. 15 (1941).

²¹ Breard had argued, in the instant case, that for local interests to protect themselves against out of state competition by an ordinance of this nature would amount to an unconstitutional interference with interstate commerce. He cited *Hood & Sons v. DuMond*, 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949), and *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), but did not prevail.

²² 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957 (1940).

chants, [and] transient vendors of merchandise."²³ A "peddler," in the ordinary, customary and usual meaning of that term, is one who travels about selling small wares which he carries with him, while a "hawker" differs from a peddler only in that he cries his wares or exhibits them for sale.²⁴ Itinerant merchants and transient vendors of merchandise were said, in *Twining v. City of Elgin*,²⁵ to be those persons who "for a short space of time locate in a city and make sale and delivery of their goods, as other merchants do, or those who carry or transport their goods from house to house or place to place and make sale and delivery of their goods in like manner as other merchants or salesmen do."²⁶ In each case, the definition would require that the vendor make delivery of the merchandise himself, a situation which would not be applicable to the case of the solicitor of magazine subscriptions. Any doubt on that score has been resolved by two other cases. In *Emmons v. City of Lewiston*,²⁷ the Illinois Supreme Court held that a city lacked authority to require book canvassers who solicited orders for books for future delivery to obtain a license since such canvassers were neither hawkers nor peddlers.²⁸ In much the same way, in *Rawlings v. Village of Cerro Gordo*,²⁹ the court held that an ordinance declaring that persons "taking orders for books, pictures, publications or other articles" should be deemed to be peddlers was invalid because such persons, in fact, were not peddlers.

If Illinois municipalities are to be validly empowered to enact ordinances of the Green River type, now that such ordinances have survived constitutional tests, amendment of the Cities and Villages Act becomes clearly necessary as the first step toward that end. Thereafter, attention would have to be given to the details herein discussed if any ordinance so enacted is to survive.

W. F. WALSH

NEGLIGENCE — ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE — WHETHER OR NOT A MANUFACTURER IS LIABLE FOR INJURIES SUSTAINED BY THIRD PERSON WHO, ON SECOND-HAND PURCHASE OF REFRIGERATOR, SUFFERS PHYSICAL HARM BY REASON OF DEFECTS THEREIN—Recently, in the case of *Beadles v. Servel, Inc.*¹ the Illinois Appellate Court for the Third

²³ Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 23—54.

²⁴ *City of Joliet v. O'Sullivan*, 303 Ill. App. 108, 24 N. E. (2d) 751 (1940).

²⁵ 38 Ill. App. 356 (1890).

²⁶ 38 Ill. App. 356 at 361.

²⁷ 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540 (1890).

²⁸ In *Village of South Holland v. Stein*, 373 Ill. 472 at 480, 26 N. E. (2d) 868 at 871, the court said "If the conviction was based on soliciting the subscriptions of a publication without a permit it was error under the decisions of this court."

²⁹ 135 Ill. 36, 25 N. E. 1006 (1890).

¹ 344 Ill. App. 133, 100 N. E. (2d) 405 (1951).

District found it necessary to pass on a unique aspect of the problem of a manufacturer's tort liability for a defective instrumentality. The plaintiffs there brought suit to recover for injuries sustained as the result of the production of carbon monoxide gas by a gas refrigerator manufactured by the defendant. The complaint alleged that the refrigerator had been constructed in such a manner as to allow carbon particles to be deposited near the burner flame thereby restricting the supply of air needed to burn off the gas, making necessary a frequent cleaning of the burner if it was to operate safely and efficiently, all of which defendant well knew or, in the exercise of ordinary care, could have known. By reason of this fact, plaintiffs charged the machine was inherently dangerous to life when put to the ordinary use for which it was intended unless a purchaser, and those who would come in contact with the machine, were warned of the inherent danger. The complaint charged a duty to so warn and that the defendant failed to provide such warning. Plaintiffs further alleged that they had purchased the refrigerator at second hand, an event which the defendant could have reasonably foreseen, and for lack of warning of the danger had suffered personal injury. A motion to strike the complaint for failure to state a cause of action was allowed and, when plaintiffs elected to stand by the complaint, the suit was dismissed. The Appellate Court, however, reversed the judgment on the ground that the complaint stated a cause of action.²

The court, in order to reach this decision, had to determine three things, to-wit: (1) whether or not the refrigerator, assuming it to have been defectively constructed, was an inherently or an imminently dangerous object; (2) whether the plaintiffs, as second hand purchasers, came within the class of persons entitled to claim a duty on the manufacturer's part; and (3) whether the length of time intervening between the manufacture and first sale of the refrigerator and the occurrence of the injury was such as to indicate that the refrigerator was of proper design and construction. It answered the first question in the affirmative on the basis of a test as to whether or not an appliance, when so defectively made, would be inherently dangerous when put to the intended, rather than to an extraordinary, use.³ On the second point, the court held that a second hand purchaser would come within the class of persons to whom

² A motion to dismiss the appeal as to a co-defendant was sustained on the ground of lack of jurisdiction to entertain the appeal by reason of the absence of a final order. It appeared that such defendant had also moved to strike the complaint but the record failed to show that any action had been taken on such motion. If, in fact, the motion to strike had been sustained, the issue might then have approximated the one to be found in the case of *Anderson v. Samuelson*, 340 Ill. App. 528, 92 N. E. (2d) 343 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 59-60.

³ 344 Ill. App. 133 at 142, 100 N. E. (2d) 405 at 410.

the manufacturer would owe a duty to provide protection against an inherently or an imminently dangerous object. With regard to the third question, the court decided that, under the facts of the case before it, the interval of time that had elapsed between the original sale and the discovery of the defect, instead of tending to show that the refrigerator was not originally defective, more nearly disclosed that the defect was of an insidious or treacherous nature rather than one possessed of a capacity to cause sudden harm.

The problem of whether or not a manufacturer owes a duty to a remote vendee or to a third person who has been injured by an article he has manufactured has confronted the courts of both the United States and England for over one hundred years. When first presented, in the celebrated English case of *Winterbottom v. Wright*,⁴ the rule was laid down that a manufacturer would not be liable to those injured by defectively manufactured instrumentalities unless there was privity of contract between the injured person and the manufacturer. It is something of a tribute to the doctrine of *stare decisis*, although not to logic, that a rule established over one hundred years ago, at a time when the modern manufacturing process was receiving its first breath of life and the distribution of goods was localized, should have persisted, although not without the development of many exceptions, to the present day of mass production and world-wide distribution.

The first exception made to the so-called "privity" rule was one relating to inherently dangerous objects.⁵ Under it, a manufacturer would be held liable for his negligence in the manufacture of goods which were, by their very nature, inherently dangerous to life or limb. In that category would clearly fall such items as explosives⁶ and poisons,⁷ but it has been suggested that even dangerous activities would be included.⁸

The next great exception was the one formulated by the late Judge Cardozo through the medium of the case of *MacPherson v. Buick Motors Company*.⁹ As stated by him, the exception was one wherein, if the nature of the thing was such that it would be reasonably certain to place life and limb in peril when negligently made, it was to be treated as a

⁴ 10 M. & W. 109, 152 Eng. Rep. 402 (1842). An excellent restatement of the English rule appears in *Christensen v. Bremer*, 263 Mass. 129, 160 N. E. 410 (1928).

⁵ *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852). See also *Stolle v. Anheuser-Busch Inc.*, 307 Mo. 502, 271 S. W. 497 (1925), and *Crane v. Sears*, 168 Okla. 603, 35 P. (2d) 916 (1934).

⁶ *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 P. 29 (1916).

⁷ *Kolberg v. Sherwin-Williams Co.*, 93 Cal. App. 609 (1928); *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852).

⁸ Restatement, Torts, Vol. IV, § 835.

⁹ 217 N. Y. 382, 111 N. E. 1050 (1916).

thing of danger. "Its nature," he said, "gives warning of the consequence to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully . . . There must be knowledge of danger, not merely possible, but probable."¹⁰ Pointing to the fact that it is possible for a person to use almost anything in a way that would make it dangerous, he warned that such fact alone was not enough to charge the manufacturer with a duty, certainly not one independent of his contract, but that knowledge was an important factor.

The case opened the door of the courts to a host of cases seeking to establish liability on a manufacturer for goods which had been defectively constructed. A wide variety of products, ranging from an elevator,¹¹ soap,¹² a faucet,¹³ an electric stove,¹⁴ shoe polish,¹⁵ a cigarette,¹⁶ a grand stand,¹⁷ a hair-waving solution,¹⁸ a washing machine,¹⁹ a sofa bed,²⁰ a balance wheel,²¹ to an inner-door bed,²² have been treated as being imminently dangerous within the meaning of the exception developed in the MacPherson case. There is, however, a degree of inconsistency in the decisions. That inconsistency can best be displayed by the fact that items of the character of a drop press,²³ a bed,²⁴ a flat iron,²⁵ a refrigerator,²⁶ and an electric body-reducing machine,²⁷ by contrast, have all been said not to be imminently dangerous hence not within the exception. It is not novel, therefore, that the court concerned with the instant case should lose sight of the distinction between an object which is inherently dangerous and one that is but imminently so. Although that distinction may amount to no more than a verbal nicety in most cases, it possesses im-

10 217 N. Y. 382 at 385, 111 N. E. 1050 at 1053.

11 *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832 (1924).

12 *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157 (1909).

13 *Clark v. Standard Sanitary Mfg. Co.*, 8 N. J. Misc. 284, 149 A. 823 (1930).

14 *Roettig v. Westinghouse Electric Co.*, 53 F. Supp. 588 (1944).

15 *Steber v. Kohn*, 149 F. (2d) 4 (1945).

16 *Liggett & Myers Tobacco Co. v. DeLape*, 109 F. (2d) 598 (1940).

17 *McCloud v. Leavitt Corp.*, 79 F. Supp. 286 (1948).

18 *Briggs v. National Industries*, 92 Cal. App. (2d) 542, 207 P. (2d) 110 (1949).

19 *Altorfer Bros. v. Green*, 236 Ala. 427, 183 So. 415 (1938).

20 *Simmons Company v. Hardin*, 75 Ga. App. 420, 43 S. E. (2d) 553 (1947).

21 *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355 (1912).

22 *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N. E. (2d) 714 (1937).

23 *McCaffey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 A. 651 (1901).

24 *Isbell v. Biederman Furniture Co.*, 115 S. W. (2d) 46 (Mo. App., 1938).

25 *Pitman v. Lynn Gas & Electric Co.*, 241 Mass. 322, 135 N. E. 223 (1922).

26 *Borg-Warner Corp. v. Heine*, 128 F. (2d) 657 (1942).

27 *Robbins v. Georgia Power Co.*, 47 Ga. App. 517, 171 S. E. 218 (1933).

portance, as will be shown later, when the question of a lapse of time between sale and injury enters into the case.²⁸

The present case is more important, however, because it represents the first case in Illinois which has extended the liability of a manufacturer so as to protect the second-hand purchaser. Earlier cases from other jurisdictions have operated to define the class of persons who come within the exceptions to the rule to the point where it may be said to be a general proposition that the manufacturer, whether of an inherently dangerous or an imminently dangerous object, is liable to all those who would reasonably be expected to come in contact with the instrumentality in the normal course of events.²⁹ Such persons as an employee of the purchaser,³⁰ a member of the purchaser's family,³¹ a borrower of the article from the purchaser,³² customers of the purchaser,³³ an insurance company by right of subrogation,³⁴ and a donee of the purchaser³⁵ have been held entitled to the benefit provided by these exceptions.

On the specific issue of the right of a second hand purchaser to sue, two cases are worthy of note. In the first, that of *Gorman v. Murphy Diesel Company*,³⁶ the plaintiff was an employee of a second hand purchaser of a diesel engine who had been injured when the machine exploded. The court held the plaintiff was within that class of persons to whom the manufacturer owed a duty but it refused judgment in his favor on other grounds. In the second, that of *Lynch v. International Harvester Company of America*,³⁷ the defendant manufacturer had delivered the machine to a second hand dealer who in turn sold it to plaintiff. When plaintiff was injured by stepping on a part of the machine which gave way, he sued the manufacturer charging a defect in construction and design. Although the court found that plaintiff was a "contemplated

²⁸ The "inherently dangerous" and the "imminently dangerous" exceptions are the ones most widely utilized where privity is lacking but liability has been imposed in other ways. See, for example, *Lewis v. Terry*, 111 Cal. 39, 43 P. 398, 2 L. R. A. (N. S.) 303 (1896), to the effect that if a manufacturer conceals known defects he may be liable because of his deceit.

²⁹ *Johnson v. Cadillac Motor Car Co.*, 194 F. 497 (1912); *Roettig v. Westinghouse Electric Co.*, 53 F. Supp. 588 (1944); *MacPherson v. Buick Motors Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

³⁰ *Schindly v. Allen-Sherman-Hoff Co.*, 157 F. (2d) 102 (1946); *Sieracki v. Seas Shipping Co.*, 149 F. (2d) 98 (1945); *Farmers State Bank of New Port v. Lamon*, 132 Wash. 369, 231 P. (2d) 952 (1925).

³¹ *Simmons Company v. Hardin*, 75 Ga. App. 420, 43 S. E. (2d) 553 (1947).

³² *Reed & Barton Corporation v. Mass*, 73 F. (2d) 359 (1924).

³³ *McCloud v. Leavitt Corp.*, 79 F. Supp. 286 (1948).

³⁴ *General Accident Ins. Co. v. Goodyear Tire & Rubber Co.*, 132 F. (2d) 122 (1942).

³⁵ *Liggett & Myers Tobacco Co. v. DeLape*, 109 F. (2d) 598 (1940).

³⁶ 3 Ter. 149, 29 A. (2d) 145 (Dela., 1942).

³⁷ 60 F. (2d) 223 (1932).

user" within the meaning of the MacPherson case, it decided for the defendant because of the lapse of five years between the original sale and the discovery of the defect. It might be said, therefore, that once it has been established that the article is either inherently or imminently dangerous the class of persons in whose favor the manufacturer's duty will run is virtually unlimited in scope.³⁸

The duration of the interval of time between the original sale and the discovery of the defect or the infliction of the injury has been considered, by most courts, as having a direct bearing on the question of whether or not the instrument was imminently dangerous at the time it was originally sold. In the Gorman case just noticed, use of a diesel engine for sixteen months prior to injury was held enough to show that the equipment was not imminently dangerous when sold by the defendant. In much the same way, in the Lynch case, user of the threshing machine there involved for five years was regarded as a conclusive rebuttal of the allegation that the machine had been imminently dangerous when first sold. Other time intervals have been regarded as long enough for this purpose. Thus, a one-year use of an ordinary bed,³⁹ seven months of use of a porch swing,⁴⁰ or a two-year use of an automobile⁴¹ have been considered adequate enough to defeat recovery on this theory. In the case under discussion, the facts disclosed that the plaintiff had used the refrigerator for seven months after he had purchased it from the original vendee but there was no showing as to how long the original purchaser had used the machine prior to the sale thereof to plaintiff. The court refused to enter into any discussion on the point as it regarded the time interval to be immaterial, saying the refrigerator was intended to be a durable product. There could be little room for argument that a refrigerator is normally intended to be a product of lasting character but, for that matter, the same thing is true of the majority of items involved in those cases where the time interval has been held important. From the evident approval of the holding in the case of *Lill v. Murphy Door Bed Company of Chicago*,⁴² wherein the time interval was deemed to be immaterial on the question of the manufacturer's negligence, the court has not only emphasized its predilection for the minority rule⁴³ but has extended the manufacturer's liability to the point where he is almost an

³⁸ See *Steber v. Kohn*, 149 F. (2d) 4 (1945), and *Liggett & Myers Tobacco Co. v. DeLape*, 109 F. (2d) 598 (1940), for far-reaching applications of this rule.

³⁹ *Field v. Empire Case Goods Co.*, 166 N. Y. S. 509, 179 App. Div. 253 (1917).

⁴⁰ *Osheroff v. Rhodes-Burford Co.*, 203 Ky. 408, 262 S. W. 583 (1924).

⁴¹ *Ford Motor Co. v. Wolber*, 32 F. (2d) 21 (1929).

⁴² 290 Ill. App. 328, 8 N. E. (2d) 714 (1937).

⁴³ In *Reed & Barton Corporation v. Maas*, 73 F. (2d) 359 (1924), use of a coffee urn for seven years was held not too long to prevent it being considered to be an imminently dangerous object.

insurer of the quality of his goods not only to the immediate purchaser but to others as well, regardless of the time that has elapsed or the number of hands through which the goods may have passed before producing an injury.

The fundamental policy for a rule requiring privity of contract between the injured person and the manufacturer, namely one designed to encourage manufacturing and to protect infant industry until it could protect itself, has long since disappeared. Instead of extending exceptions to that rule, or providing for the creation of new ones, courts should, as in the instant case, follow a lead that has already been marked out⁴⁴ in recognition of the fact that the exceptions have long since swallowed up the rule.

D. J. DONOVAN

STATES—POLITICAL STATUS AND RELATIONS—WHETHER OR NOT A STATE STATUTE WHICH PROHIBITS ACTION THEREIN ON A FOREIGN WRONGFUL DEATH CLAIM IS CONSTITUTIONAL—The case of *Hughes v. Fetter*¹ presented the Supreme Court of the United States with a question as to whether or not a Wisconsin statute,² one forbidding the courts of that state from entertaining actions based on foreign wrongful death claims, amounted to a denial of that degree of full faith and credit required by the federal constitution³ so as to be unconstitutional. The question arose when the plaintiff, an administrator appointed by a Wisconsin court, brought a wrongful death action in a Wisconsin court, based on the Illinois Injuries Act,⁴ to recover for fatal injuries inflicted on his intestate in Illinois. The allegedly negligent driver together with his insurance carrier, both residents of Wisconsin, were named as defendants. These defendants, acting on the basis of the prohibition in the local statute, moved for and procured a summary judgment dismissing the complaint. The Supreme Court of Wisconsin affirmed this disposition of the case notwithstanding the reiteration before it of the contention that the proviso of the Wisconsin statute amounted to a violation of the full faith and

⁴⁴ See *Todd Shipyards Corporation v. United States*, 69 F. Supp. 609 (1947), and *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N. E. (2d) 693, 164 A. L. R. 559 (1946).

¹ 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951), reversing 257 Wis. 35, 42 N. W. (2d) 452 (1950). Associate Justice Frankfurter wrote a dissenting opinion which was concurred in by Associate Justices Jackson, Reed and Minton.

² Wis. Stat. 1949, § 331.03. The statute contains language typical of that found in wrongful death acts but concludes with a proviso that "such action shall be brought for a death *caused in this state*." Italics added.

³ U. S. Const., Art. IV, § 1.

⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 1 et seq.

credit clause.⁵ On further appeal,⁶ the Supreme Court of the United States, by a divided vote, reversed the state court decision and directed that the cause be reinstated. In achieving that result, the majority of the court held that a strong federal policy looking toward a unification of the states, enunciated in the full faith and credit clause, overrode any local policy of the forum, particularly since Wisconsin had no real antagonism against wrongful death actions in general.

Heretofore, in matters involving foreign wrongful death statutes, the general rules of conflict of laws have been applied. It has, for example, been held that the foreign statute will be enforced through comity unless it violates the public policy of the forum, is penal in nature, or where local procedure is inadequate to support enforcement.⁷ A few jurisdictions have refined this rule so as to require that the statutes of the forum and of the place of the wrong must be substantially similar before recognition is possible,⁸ a refinement which apparently represents a modification of the English attitude toward foreign torts⁹ but one which has been sharply criticized.¹⁰

The injection of the full faith and credit clause as a basis for compelling the forum to recognize the foreign wrongful death claim is new to this branch of tort law although, in relatively recent years, its importance to private international law has grown.¹¹ The primary responsibility for this growing concept has been a recognition by the Supreme Court that a statute is a "public act" within the meaning of the full faith and credit clause¹² so that states cannot escape their constitutional

⁵ 257 Wis. 35, 42 N. W. (2d) 452 (1950), noted in 49 Mich. L. Rev. 756.

⁶ 28 U. S. C. A. § 1257 authorizes review by appeal where a state statute has been declared valid over an objection that it was repugnant to some provision of the federal constitution.

⁷ The case of *Lauria v. E. I. DuPont de Nemours Co.*, 241 F. 687 (1917), contains a full discussion of the comity doctrine and cites many cases on the point. It also treats with the limitations thereon.

⁸ *London Guarantee & Accident Co. v. Balgowan S. S. Co.*, 161 Md. 145, 155 A. 334, 77 A. L. R. 1302 (1931). The annotation thereto, beginning at 77 A. L. R. 1311, cites more cases as well as serves to point out whether a given dissimilarity is to be deemed fatal or not.

⁹ English courts will refuse to enforce a claim based on a foreign tort unless a similar claim would be actionable in England according to English law: *Morris, Dicey's Conflict of Laws* (Stevens & Sons, Sweet & Maxwell, London, 1949), 6th Ed., p. 800, Rule 174.

¹⁰ *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

¹¹ The majority of the cases in which the full faith and credit clause has been invoked concern workmen's compensation claims or certain phases of commercial law.

¹² *McKnett v. St. Louis & S. F. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934); *Kenny v. Supreme Lodge, L. O. M.*, 252 U. S. 411, 40 S. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716 (1920). *Contra*: *Bullington v. Angel*, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054 (1941). But see *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947).

obligation by the simple device of denying jurisdiction to courts which would otherwise be competent.¹³ In view of these pronouncements, there has been a gradual realization of the fact that the full faith and credit clause operates as a restriction upon the freedom courts would otherwise enjoy under the rules of international comity.¹⁴ As a consequence, the public policy of the forum and the character of the foreign law no longer form a conclusive bar to the enforceability of the foreign statute.

The question which naturally follows from the foregoing observation concerns the extent to which recognition of foreign enactments is restricted by anything in the full faith and credit clause itself. It is clear that the forum will not be compelled to recognize foreign law in every case since a compulsion that broad could lead to the absurd result that a state would have to administer certain laws for the benefit of foreigners when they would be foreclosed from doing the same thing for their own citizens.¹⁵ It is also clear, by the wording used, that the clause was intended to possess a restrictive effect on the privilege of comity. In order to solve the problems which arise when a case falls between these extremes, the Supreme Court has evolved a test intended to balance the governmental interest of the forum with that of the state whose statute is sought to be enforced.¹⁶ In the administration of this test, the court is asked to make a qualitative analysis of all the elements of the case while attempting to weigh the interests of each competing state. If it should appear that the forum has a greater interest, full faith and credit may constitutionally be denied to the foreign statute.¹⁷ Conversely, if the interest of the forum is but slight, the foreign statute should be recognized.¹⁸ However, since

¹³ *Bradford Elec. Light Co. v. Clapper*, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026 (1932); *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

¹⁴ See annotation in 134 A. L. R. 1472.

¹⁵ *Alaska Packers Association v. Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

¹⁶ *Pacific Employers Insurance Co. v. Industrial Accident Comm.*, 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133 (1935); *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696 (1932); *Olmstead v. Olmstead*, 216 U. S. 386, 30 S. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1910). See also annotation in 134 A. L. R. 1472.

¹⁷ *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); *Olmstead v. Olmstead*, 216 U. S. 386, 30 S. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292 (1910). Once a judgment is entered in the foreign state in a suit based on the foreign statute, however, the forum wherein the judgment is sought to be enforced must, if it is otherwise valid, give full faith and credit thereto even though the forum had the greater governmental interest: *Hunt v. Magnolia Petroleum Co.*, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943).

¹⁸ *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 57 S. Ct. 127, 81 L. Ed. 106 (1936); *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696 (1932). Where the governmental interests

each state is *prima facie* entitled to enforce its own statutes in its own courts, the burden lies on the proponent of the foreign statute to show rationally why local law should be subordinated to it.¹⁹

The distinctive feature of the instant case lies in its departure from the foregoing test. Instead of analyzing the degree of conflict existing between the governmental interests of Illinois and Wisconsin, the Supreme Court said that the conflict was one between the local policy of Wisconsin on the one hand and the federal policy of unification, as exemplified by the full faith and credit clause, on the other. It is to be noted that a new element has thereby been introduced into an already unsettled picture.²⁰ The meaning to be given to the concept of "unification," as used by the court, is not altogether clear. However, the most logical interpretation to be given to the case is that a federal policy of unification, as there employed, amounts to one under which the local policy of one state should not be permitted to operate so as to defeat a substantive remedy created by a sister state unless the local policy is grounded on a well found and impelling reason. This thought takes on significance when it is remembered that difficulties in the service of process might well become a practical bar to the enforcement of the remedy when the defendant cannot be reached in the state where the wrong was committed. If the state of the defendant's residence should refuse to recognize the foreign action, the plaintiff would then, in fact, be without a remedy so long as the defendant continued to maintain the asylum provided by the place of his residence.²¹ It is important, therefore, to limit the instant case in this manner. To give it a broad construction so as to have it call for absolute certainty and ultimate extra-territorial effect of all law between the sister states would be a most radical view and one certainly not warranted by the holding of the case.

The principal case should be of particular interest to the Illinois practitioner as the Illinois Injuries Act²² also contains a proviso pro-

of the two states appear to be equally balanced, the forum is free to apply its own law: *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939). It must, of course, be remembered that if the foreign statute is merely procedural in character the full faith and credit clause does not require its recognition: *Vitaphone Corp. Electrical Research Products*, 19 Del. Ch. 247, 166 A. 255 (1933).

¹⁹ *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

²⁰ As heretofore used, the test was primarily factual in character but, for lack of a sufficient number of cases calling for its application, it had not become definite in its nature.

²¹ Courts and legislatures, in recent years, have become more and more aware of the practical difficulties posed in the job of obtaining jurisdiction. Notes in 28 *CHICAGO-KENT LAW REVIEW* 347 and in 34 *Ky. L. J.* 139 discuss cases wherein a more functional approach to jurisdiction has been employed.

²² Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2.

hibiting the bringing of actions in Illinois for deaths caused or occurring outside of the state if the law of the place of the wrongdoing recognizes a cause of action for the fatality and service of process may be had in such place.²³ It was urged, in the early Illinois case of *Dougherty v. American McKenna Process Company*,²⁴ that this statutory provision was unconstitutional as it amounted to a denial of full faith and credit. However, even though the factual situation was similar to the one found in the instant case, the court felt that it could not depart from the traditional comity theory and, therefore, it cast the argument aside. This attitude was typical of the times.²⁵

A much later case dealing with the operative effect of the Illinois proviso is the recent federal court holding in *First National Bank of Chicago v. United Air Lines*.²⁶ The plaintiff's intestate there, an Illinois resident, had been fatally injured in an airplane crash in Utah. A wrongful death action, based on the Utah statute,²⁷ was commenced in a federal court sitting in Illinois. Jurisdiction over the cause was based on diversity of citizenship. The defendant obtained a summary judgment in its favor by virtue of the proviso contained in the Illinois Injuries Act.²⁸ The plaintiff, relying on the holding of the principal case, contended that the Illinois statute was likewise unconstitutional. The Court of Appeals for the Seventh Circuit, however, on review of the lower court decision, rejected this argument. It pointed out that a distinction existed between the Wisconsin and the Illinois statutes as the former purported to pronounce an absolute bar against the foreign wrongful death action while the latter was qualified in that it allowed the maintenance of a local suit where service of process was not possible in the foreign jurisdiction. As the Illinois statute was said not to operate so as to deny all remedy,²⁹ the case lends support to the fundamental theory

²³ *Trust Co. of Chicago v. Pennsylvania R. R. Co.*, 183 F. (2d) 640 (1950); *Wall v. Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 125 N. E. 20 (1919). The prohibition does not apply to an action based on the Federal Employers' Liability Act when brought in a federal court sitting in Illinois, *Waltz v. Chesapeake & Ohio Ry. Co.*, 65 F. Supp. 913 (1946), nor where the death has occurred in Illinois even though caused without the state, *Carroll v. Rogers*, 330 Ill. App. 114, 70 N. E. (2d) 218 (1946).

²⁴ 255 Ill. 369, 99 N. E. 619, L. R. A. 1915F 955, Ann. Cas. 1913D 568 (1912).

²⁵ In *Carey v. Schmeltz*, 221 Mo. 132, 119 S. W. 946 (1909), for example, the court, speaking of the enforceability of foreign statutes, said: "But this we do in respect to the settled rules of public and international law . . . It is not done in obedience to [the] full faith and credit clause of the constitution."

²⁶ 190 F. (2d) 493 (1951). It is understood that certiorari has been granted.

²⁷ Utah Code Anno. 1943, § 104-3-11.

²⁸ Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2.

²⁹ The court made no mention of the earlier holding in the comparable case of *Martineau v. Eastern Air Lines*, 64 F. Supp. 235 (1946), wherein a federal district court sitting in Illinois had refused to be bound by the proviso of the Illinois Injuries Act on the ground the same was procedural in character and could not

of the Hughes case that the purpose of the full faith and credit clause is to prevent one state from denying a remedy created by a sister state where no real antagonism exists between the law of the sister state and that followed in the forum.

When the scope of the instant case is properly limited, the correctness of the outcome cannot be challenged for it takes a realistic approach toward the problems involved. The real criticism, rather, should be directed at the seeming wisdom of the particular Illinois statute. A recognition of the increasing multitude of accidents occurring to citizens of different states because of increased interstate travel makes the problem more than an academic one. The Illinois statute does not really serve to protect the citizens of Illinois from suit in foreign death cases for, if they are not amenable to service of process at the *locus delicti*, the action can then be brought in this state. The true effect of the statute is to impose inconvenience, with its consequent hardship, on the representatives of Illinois residents killed in foreign states by forcing them to go out of the state to seek redress even though personal jurisdiction could be acquired over the defendants in Illinois. The purported reason for the Illinois proviso has been said to rest on the idea that the case load of the Illinois courts would be unbearably increased if such actions were permitted.³⁰ Such a reason, if reason it be, loses much of its effectiveness when it is weighed against the hardship that the Illinois citizen is forced to suffer in being deprived of the right to use his own courts. Repeal of the objectionable provision would seem to be clearly called for.³¹

operate to limit the jurisdiction of a federal court. The court there relied on the case of *Stephenson v. Grand Trunk Western R. R. Co.*, 110 F. (2d) 401, 132 A. L. R. 455 (1940), which also involved a suit in a federal court sitting in Illinois based on a fatal accident occurring in Michigan, wherein it was held that nothing in the Illinois statute could oust the federal court of its jurisdiction to award damages in a case where diversity of citizenship existed. While this theory was rejected in the later case of *Trust Co. of Chicago v. Pennsylvania R. Co.*, 183 F. (2d) 640 (1950), there is reason to suppose, even accepting the Illinois provision as being constitutional, that it may still be inapplicable in suits brought in federal courts despite its controlling character as to Illinois state court actions falling within the language of the proviso.

³⁰ *First National Bank of Chicago v. United Air Lines*, 190 F. (2d) 493 (1951).

³¹ At the time the case of *Hughes v. Fetter*, cited in note 1 ante, was decided only Illinois and Wisconsin possessed statutes limiting suit on foreign death claims. Now that the Wisconsin statute has been declared unconstitutional, Illinois stands alone. The absence of similar limitations, or even the demand therefor, in other states would seem to belie the vaunted fear concerning the overwhelming burden which would be added to judicial labor if suits based on foreign claims were to be permitted. While it is desirable to be in the vanguard of every progressive step taken in law, the converse thereof is not cause for congratulation.

WILLS—REQUISITES AND VALIDITY—WHETHER OR NOT THE USE OF EXTRINSIC EVIDENCE OPERATING TO MODIFY AN INSTRUMENT WHICH IS INCORPORATED INTO A WILL BY REFERENCE RESULTS IN A PERMISSIBLE ALTERATION OF THE WILL—In the recent case of *Continental Illinois National Bank & Trust Company v. Art Institute of Chicago*,¹ an inter vivos trust had been created by written agreement naming the trust company as trustee thereunder. The settlor, pursuant to the agreement, subsequently perfected seven different amendments to this document. The third amendment, one executed in 1936, was designed to eliminate one Homer Chatmon and the Shriner's Hospital of Chicago as beneficiaries under the trust. The office practice of the trustee had been to keep a copy of each amendment in its open files but to retain the original, with the basic agreement, in its vault. Through some oversight, the office copy of the third amendment became lost or mislaid so, at the time of the making of later amendments to the trust agreement, no reference was made to the amendment of 1936, although the same was actually in existence in the locked file. Reference was made from time to time, however, as to each of the other amendments. The settlor had also made a will, with a codicil thereto, which gave the residue of his estate to the trustee to be distributed in accordance with the trust agreement and certain of its enumerated amendments, but here again he failed to make reference to the 1936 amendment.² On the death of the settlor-testator, the trustee-executor found it necessary to sue for a construction of the trust agreement, as amended, and the will. Both Chatmon and the Shriner's Hospital, named in that proceeding, claimed that the 1936 revocatory amendment did not operate to control either the inter vivos trust or the disposition of the residuary estate. The trial court, however, determined that it was controlling as to both. The Appellate Court for the First District affirmed that decision and, on leave to appeal, the Illinois Supreme Court likewise affirmed despite a strong minority opinion refuting that part of the decision which held that the 1936 amendment regulated the disposition of the residuary estate.

It is obviously the law that a properly executed and unrevoked amendment to a trust agreement must, by the very terms of that agreement, operate to control the disposition of the trust res. There is occasion to

¹ 409 Ill. 481, 100 N. E. (2d) 625 (1951), affirming 341 Ill. App. 624, 94 N. E. (2d) 602 (1950). Gunn, J., wrote a dissenting opinion concurred in by Simpson, Ch. J., and Daily, J.

² The oversight appears to have been produced by the fact that the attorney who was engaged to draft the will, the codicil, and the several amendments to the trust agreement, worked from the open office file of the trustee, rather than on the basis of the original instruments locked in the trustee's vault, and did not know of, nor was his attention called to, the 1936 amendment.

doubt the correctness of the decision in the instant case, however, as it applies to the residuary estate passing under the will. The rule is well settled that the only intention to be established in the construction of a will is that expressed in the instrument, and not one which may have existed in the mind of the testator but which was left unexpressed.³ Extrinsic evidence may be introduced to aid in the interpretation of an intent expressed, but cannot be allowed to supply a completely new intent.⁴ It was with that primary rule in mind that the minority of the court objected strenuously to the construction given to the will and codicil by the majority. On a review of the facts and law applicable, the dissent seems to be entirely justified in the ultimate conclusion reached, to-wit: that a simple mistake had occurred which could not, by the aid of extrinsic evidence, be rectified.

That conclusion was reached by following a logical and elemental course. The testator, it was pointed out, had incorporated the original trust agreement and six of the seven amendments, listed by description, into the will and codicil by reference. In this way, the manner pursuant to which the residuary estate was to be distributed was made known. One of the basic elements generally needed for a successful incorporation of an extrinsic document into a will by reference is one which requires that the document be reasonably described.⁵ In other words, that which is to be incorporated into a will must meet the description set forth in that will. In the instant case, only the trust agreement and six of its amendments, minus the 1936 correction, met that description. As introduction of the 1936 amendment would require the bringing in of a new intent, rather than to serve to explain an intent already expressed, the only conclusion to be deduced would be one calling for its rejection in connection with the construction to be given to the will and codicil.

How the majority of the court came to the final determination as to the residuary estate that it did is not too clearly explained. It stated that the gift under the codicil, in relation to the trust instrument and its amendments, presented "the same ambiguity and requires the same conclusion as was reached in the foregoing consideration of the trust agreement and its amendments."⁶ This could mean only that the majority believed that

³ *Gowling v. Gowling*, 405 Ill. 165, 90 N. E. (2d) 188 (1950); *Lenzen v. Miller*, 378 Ill. 170, 37 N. E. (2d) 833 (1941); *Wickizer v. Wickizer*, 364 Ill. 125, 4 N. E. (2d) 46 (1936); *Robinson v. Von Spreckleson*, 287 Ky. 705, 155 S. W. (2d) 30 (1941); *Perkins v. Eglehart*, 187 Md. 520, 39 A. (2d) 672 (1944); *Boston Safe Deposit & Trust Co. v. Park*, 307 Mass. 255, 29 N. E. (2d) 977 (1940).

⁴ *Wagner v. Clauson*, 399 Ill. 403, 78 N. E. (2d) 203 (1948); *Caruthers v. Fisk University*, 394 Ill. 151, 68 N. E. (2d) 296 (1946); *Northern Trust Co. v. Cudahy*, 339 Ill. App. 603, 91 N. E. (2d) 607 (1950).

⁵ *Bottrell v. Sprengler*, 343 Ill. 476, 175 N. E. 781 (1931).

⁶ 409 Ill. 481 at 491, 100 N. E. (2d) 625 at 630.

the testator's intention to incorporate the 1936 amendment, as well as the others, into his codicil was apparent on the face of the codicil, so as to make it possible to receive extrinsic proof to explain and to identify the objects of his bounty. It is generally agreed that, when seeking to ascertain the testator's intention, the words of a will are to be read in the light of the circumstances under which the will was made. To that end, a court may put itself in the place of the testator for the purpose of determining the objects of the testator's bounty or the property which is to be the subject of disposition.⁷ It is proper, in such an inquiry, to take into consideration all the circumstances under which the will was executed, including the nature, extent, and condition of the testator's property, as well as his relation to his family and to the beneficiaries named in the will. The rule is inflexible, however, both in Illinois and in a majority of the jurisdictions in this country, that, for the purpose of importing into the will an intention which is not there expressed, proof of surrounding circumstances will be inadmissible no matter how clearly such different intention may be made to appear.⁸ Certainly, a new and different intent was being inserted into the will and codicil in the instant case by reading into it the terms of the 1936 amendment. It is quite likely that it was the testator's true desire to include that amendment in his codicil, but the cases are quite positive on the point that only that intent which is expressed upon the face of the will should control as to all matters of construction.

The majority, as well as the minority, reached a unanimous conclu-

⁷ *Thomas v. Reynolds*, 234 Ala. 212, 174 So. 753 (1937); *Dyer v. Lane*, 202 Ark. 571, 151 S. W. (2d) 678 (1941); *Hoops v. Stephan*, 131 Conn. 138, 38 A. (2d) 588 (1944); *Bird v. Wilmington Soc. of Fine Arts*, 28 Del. Ch. 449, 43 A. (2d) 476 (1945); *Gridly v. Gridly*, 399 Ill. 215, 77 N. E. (2d) 146 (1948); *Jackman v. Kasper*, 393 Ill. 496, 66 N. E. (2d) 678 (1946); *Quigley v. Quigley*, 370 Ill. 151, 13 N. E. (2d) 186 (1938); *Moffet v. Cash*, 346 Ill. 287, 178 N. E. 658 (1931); *LaRocque v. Martin*, 344 Ill. 522, 176 N. E. 734 (1931); *Boys v. Boys*, 328 Ill. 47, 159 N. E. 217 (1927); *Dollander v. Dhaemers*, 297 Ill. 274, 130 N. E. 705, 16 A. L. R. 8 (1921); *Himmel v. Himmel*, 294 Ill. 557, 128 N. E. 641 (1920); *Walker v. Walker*, 283 Ill. 11, 118 N. E. 1014 (1918); *DesBouef v. DesBouef*, 274 Ill. 594, 113 N. E. 900 (1916); *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376 (1907); *Andrews v. Applegate*, 223 Ill. 535, 79 N. E. 176 (1906); *Fetty v. Easterling*, 286 Ky. 34, 149 S. W. (2d) 760 (1941); *In re Holmes' Estate*, 233 Wis. 274, 289 N. W. 638 (1940).

⁸ *Murphy v. Morris*, 200 Ark. 932, 141 S. W. (2d) 518 (1940); *Ellsworth v. Arkansas Nat. Bank*, 194 Ark. 1032, 109 S. W. (2d) 1258 (1937); *Mitchell v. Snyder*, 402 Ill. 379, 83 N. E. (2d) 680 (1949); *Jackman v. Kasper*, 393 Ill. 496, 66 N. E. (2d) 678 (1946); *Ickes v. Ickes*, 386 Ill. 19, 53 N. E. (2d) 585 (1944); *Lenzen v. Miller*, 378 Ill. 170, 37 N. E. (2d) 833 (1941); *Robinson v. Von Spreckleson*, 287 Ky. 705, 155 S. W. (2d) 30 (1941); *In re Stuart's Estate*, 274 Mich. 282, 264 N. W. 372 (1936). In *Lenzen v. Miller*, 378 Ill. 170 at 177, 37 N. E. (2d) 833 at 837, the court said: "The intention of the testator which the courts will carry into effect is that expressed only by language of the will which must be interpreted in view of all the circumstances surrounding the testator, and evidence will be received to show those circumstances, but it will not be permitted to import into the will an intention different from that expressed by its language, however clearly such different intention may be made to appear."

sion when they established, at the time of construing the trust agreement, that the 1936 amendment operated to control the disposition of the property held pursuant to the inter vivos trust. It is conceived that the majority erred, however, when they clung to this decision as being conclusive on the point of the construction to be given to the codicil, where it had no logical or related significance. Simply because it had been determined that the disposition of the property given in trust before the testator's death was to be controlled by the 1936 amendment should provide no logical ground upon which to base an opinion that property passing after death via a codicil should also be similarly controlled.

It is at this point that it appears as though the majority by-passed the real issue. On the issue of construing the trust agreement, the important question was whether the existence of the 1936 amendment could or could not be proven. In the aspect of the case relating to the will, the only issue was whether, existence of the amendment being admitted, the amendment could then be brought in to control the distribution of the residuary estate. Under the rule promulgated by the majority, if a testator has omitted a given intent from a document which has been incorporated into a will by reference, that omission may be rectified by the free use of extrinsic evidence. Such an amendment, it has said in effect, would amount only to an alteration of the document incorporated in the will but would not work a change in the will itself. The apt reply of the minority was to the effect that no amount of legal sophistry could displace the conclusion that the process of amending an instrument incorporated in a will by reference would also be productive of an amendment to the will.⁹

To observe further how the majority must have felt that a construction of the codicil would have to be controlled by the previous interpretation it had given to the trust agreement, when in fact the two were separate and distinct problems, one merely need pay regard to certain of their other statements. It was said, for example, in holding that the residuary estate was to be controlled by an amendment not mentioned in the codicil, that "to hold otherwise [would be] to change the duties of the trustee and amend the trust by a method other than that prescribed in the trust instrument."¹⁰ It was also said, in answer to a contention that the 1936 amendment did not control the distribution of the residuary estate, that

⁹ *Wagner v. Clauson*, 399 Ill. 403, 78 N. E. (2d) 203 (1948); *Bottrell v. Sprengler*, 343 Ill. 476, 175 N. E. 781 (1931); *Marshall v. Kent*, 210 Ky. 654, 276 S. W. 563 (1925). In the case of *In re Hopper's Estate*, 90 Neb. 622, 134 N. W. 237 (1912), the decedent purported to incorporate six deeds into his will by reference. It was held that parol evidence could not be accepted to vary the intent expressed in the deeds.

¹⁰ 409 Ill. 481 at 491, 100 N. E. (2d) 625 at 630.

"the trouble with this contention is that the trust instrument and the trust are governed by all the amendments."¹¹ For some reason, the majority appear to have felt that if the trust agreement was to be controlled by the 1936 amendment then nothing was left to do but to attach it to the construction of the codicil also.

Final analysis of the issue presented in the instant case affords no substantial justification for the stand taken by the majority. The most that could be said in favor of the holding is that the majority may have felt that an intent to include the 1936 amendment could be implied from language appearing on the face of the codicil. But not even that conclusion would appear to have been an accepted basis for the decision. Instead, as has been pointed out, the main emphasis to substantiate the majority holding was placed upon unrelated law and a general side-stepping of the real issues involved. Instead of accepting the clear fact that the 1936 amendment had not been mentioned in the will or codicil, and that no inference could be drawn from this fact, the majority engaged in casuistic argument resulting in an unsound decision.

H. FAWELL

¹¹ Ibid.

RECENT ILLINOIS DECISIONS

APPEAL AND ERROR—REVIEW—WHETHER OR NOT IT IS REVERSIBLE ERROR FOR DEFENDANT'S COUNSEL, IN A PERSONAL INJURY SUIT, TO INFORM THE JURY THAT THE DEFENDANT IS NOT COVERED BY INSURANCE—The plaintiff, in the recent case of *Humkey v. Hueslmann Quarry, Inc.*,¹ sued to recover for personal injuries sustained in a motor vehicle collision. Counsel for defendant, during his opening statement, informed the jury that the defendant was not covered by insurance. The plaintiff objected to this remark and moved for a mistrial, but the trial court overruled the objection and denied the motion. The jury thereafter rendered a verdict in favor of the defendant and judgment was granted thereon. The plaintiff appealed to the Appellate Court for the Fourth District, claiming error in the ruling aforementioned. The Appellate Court agreed that error had been committed and, reversing the judgment, remanded the case for further proceedings.

Illinois courts, because of the potential prejudice likely to exist, have generally held that it is error for a plaintiff to introduce evidence that a defendant involved in a personal injury case is insured against liability for harm done.² The only exception to that rule would seem to be one which permits the interrogation of prospective jurors, after a proper showing, as to a possible financial connection with an insurance company or companies,³ since an answer thereto might reveal cause for challenge. The instant case is of particular importance because it represents the first time, with the possible exception of the decision in *Smith v. Raup*,⁴ that a reviewing court of Illinois has been called upon to determine the opposite type of situation, one in which the defendant seeks to inform the jury that he was not covered by insurance. The court based its holding

¹ 343 Ill. App. 377, 99 N. E. (2d) 351 (1951).

² *Smithers v. Henriquez*, 368 Ill. 588, 15 N. E. (2d) 499 (1938), noted in 16 CHICAGO-KENT REVIEW 371; *Kavanaugh v. Parret*, 379 Ill. 273, 40 N. E. (2d) 500 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 371; *Kelly v. Call*, 324 Ill. App. 143, 57 N. E. (2d) 501 (1944).

³ *Edwards v. Hill-Thomas Lime & Cement Co.*, 378 Ill. 180, 37 N. E. (2d) 801 (1941); *Bellomy v. Bruce*, 303 Ill. App. 349, 25 N. E. (2d) 428 (1939). But see *Wheeler v. Rudick*, 397 Ill. 438, 74 N. E. (2d) 601 (1947), noted in 36 Ill. B. J. 250.

⁴ 296 Ill. App. 171, 15 N. E. (2d) 939 (1938). The defendant there was called by the plaintiff as an adverse witness and, during the course of this examination, he testified, without objection, that after the accident plaintiff had asked him if he carried insurance. Upon direct examination, defendant testified that, when plaintiff had asked him this question, he had replied in the negative. The Appellate Court for the Second District held that no reversible error had occurred. There is dictum in the opinion which might seem to indicate that the court favored the idea of having a defendant inform the jury that he possessed no insurance. Even if error had occurred, plaintiff was in no position to complain since he had invited the same.

on the theory that to permit introduction of the question of the presence or absence of insurance into a personal injury action necessarily places one party under a handicap and gives to the other an advantage, which handicap and advantage have no place in the trial of a case. The decision represents no more than a logical extension of the rule previously noted as to plaintiffs. It leaves the fundamental policy question, one concerning whether or not it would be appropriate to make the insurance carrier a party defendant in every such case, untouched to await legislative consideration.

CHARITIES—CONSTRUCTION, ADMINISTRATION AND ENFORCEMENT—WHETHER OR NOT FUNDS OBTAINED BY A CHARITABLE ORGANIZATION THROUGH LEVY OF ASSESSMENTS AND DUES CONSTITUTE NON-CHARITABLE FUNDS—In the late case of *Slenker v. Gordon*,¹ the plaintiff sued the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to recover for personal injuries sustained when his automobile was struck by another car negligently driven by Gordon who, at the time of the accident, was performing duties for the corporate defendant within the scope of his agency. Judgment for the corporate defendant, notwithstanding a verdict for the plaintiff, was entered by the trial court on the ground that the Grand Lodge was a charitable corporation possessed solely of trust funds, hence was immune to judgment. The Appellate Court for the Second District, on the record before it in an appeal taken by the plaintiff, affirmed such judgment. Counsel for the plaintiff had admitted that the corporate defendant was created solely for charitable purposes, thereby recognizing the immunity extended in Illinois to the trust funds of such organizations. It was his contention, however, that certain of the funds of the corporate defendant, having been raised by assessment imposed upon its members under penalty of expulsion if not paid, could not be classified as a part of the charitable funds. The Appellate Court held that it was not the source from which the fund was derived, nor the manner of its acquisition, which was to be deemed important but that it was the end purpose to which the fund was to be devoted that controlled the issue. As the funds in question were ultimately to inure to the benefit of charity, except that part necessary to pay the administration expenses, it was held that they came within the scope of the immunity.

In the earlier Illinois case of *Moore v. Moyle*,² where another charitable organization had been sued for the negligence of one of its employees, the Illinois Supreme Court circumscribed the immunity theory by finding

¹ 344 Ill. App. 1, 100 N. E. (2d) 354 (1951). Leave to appeal has been denied.

² 405 Ill. 555, 92 N. E. (2d) 81 (1950).

the charity in question to be possessed of non-charitable assets consisting of the proceeds of certain liability insurance policies. Following upon that decision, there was an expression of some degree of belief that Illinois courts would begin to designate other funds, such as general operating funds or moneys collected by way of assessment of mandatory fees, as being "noncharitable,"³ or might even join the modern trend now turning in the direction of liability, rather than immunity, for wrongdoing.⁴

The decision in the Slenker case, together with denial of leave to appeal therein, would tend to belie that hope, for it would seem as if all funds of a charitable institution are to be considered exempt from tort liability if those funds, no matter how raised, are to be utilized for the furtherance of the general charitable purposes of the organization. Few other cases exist on this point, but two holdings, one from Georgia and one from Tennessee, have passed on the issue. In the Georgia case of *Morton v. Savannah Hospital*,⁵ it was said that if a hospital receives, or has due to it, money from *paying* patients, *such* money does not constitute part of the charitable trust fund. The Tennessee case of *Hammond Post v. Willis*⁶ would subject all *general operating funds* to execution. These cases would, at least, give heed to the source of the funds, separating those paid under compulsion from those voluntarily donated to the charity.⁷ In the light of the instant case, since the typical Illinois charitable or eleemosynary organization utilizes all cash receipts in the furtherance of its charitable purpose, after extracting enough to pay its operating expenses, about the only potential non-trust asset such an organization could be said to possess would take the form of insurance coverage. In the absence thereof, there would seem to be little hope of securing a recovery from the corporate charity.

³ DeFeo and Spencer, "After *Moore v. Moyle*: Then What?" 29 CHICAGO-KENT LAW REVIEW 107 (1951), particularly p. 117.

⁴ The recent case of *Haynes v. Presbyterian Hospital Association*, 241 Iowa 1269, 45 N. W. (2d) 151 (1950), represents a complete reversal of the doctrine previously followed in Iowa. Even more recently, in *Durney v. St. Francis Hospital, Inc.*, — Dela. Super. —, 83 A. (2d) 753 (1951), a court of that state was asked, for the first time, to consider and adopt the immunity doctrine but refused to accept or apply it. The states of New Mexico and South Dakota would appear to be the only ones left in which the issue has not yet been raised: 28 CHICAGO-KENT LAW REVIEW 107 at 109, particularly note 8.

⁵ 148 Ga. 438, 96 S. E. 887 (1918).

⁶ 179 Tenn. 226, 165 S. W. (2d) 78 (1942).

⁷ In *Summers v. Chicago Title & Trust Co.*, 335 Ill. 546, 167 N. E. 777 (1929), it was said that a "school charging tuition or fees" did not, thereby, lose its character as a "charitable institution." See also *Hogan v. Chicago Lying-In Hospital*, 335 Ill. 42, 166 N. E. 461 (1929). Charity, however, has generally come to be regarded as the free-will offering or donation of money or services.

CRIMINAL LAW—EVIDENCE—WHETHER OR NOT THE RESULTS OF A BREATH TEST TO DETERMINE THE PRESENCE OF INTOXICATION WOULD BE ADMISSIBLE OPINION EVIDENCE IN A CRIMINAL CASE—The Appellate Court for the First District, in the recent case of *People v. Bobczyk*,¹ was confronted with a question concerning the admissibility in evidence of expert testimony based on the result of a test performed on a device known as a Harger Drunkometer, one used to test the alcoholic content of the subject's breath. The defendant there involved had been charged with driving an automobile while intoxicated. He appeared to have voluntarily submitted to the Harger test, which test revealed a sufficiently high concentration to support the belief that the defendant was then intoxicated. At the trial on such charge, the defendant contended that the results of the test were inadmissible evidence as the device used had not received general scientific recognition as providing an accurate index of the amount of alcohol in the blood. After testimony as to the underlying theory of the test and of its probabilities of accuracy, given by the inventor and by a toxicologist, the trial court admitted the evidence and the defendant was convicted. On his appeal, the Appellate Court for the First District affirmed the conviction, stating that any lack of unanimity of the medical profession as to whether or not the presence, and degree, of intoxication could be determined from a person's breath went to the weight and not to the admissibility of expert testimony based on such a breath test.

The problem presented appears to be the first of its kind to be passed upon by a reviewing tribunal in Illinois and there is very little authority to be found in other jurisdictions. What few reported cases exist seem to provide a definite split of opinion over the subject. In the Texas case of *McKay v. State*,² cited by the court as authority, the results of the Harger test were there admitted upon the same ground as stated in the principal case. In the Michigan case of *People v. Morse*,³ however, the results of the test were excluded on the basis that the test lacked general scientific recognition to date. It would be difficult to formulate a general rule on the point, in view of the limited number of cases, but there would seem to be a trend toward admitting the results of various tests relating to alcoholism⁴ in the absence of a possible objection on constitutional grounds because of the element of self-incrimination involved in ad-

¹ 343 Ill. App. 504, 99 N. E. (2d) 567 (1951). An extensive study of various tests relating to intoxication appears in Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 Iowa L. Rev. 191 (1939).

² — Tex. —, 235 S. W. (2d) 173 (1950).

³ 325 Mich. 270, 38 N. W. (2d) 322 (1949).

⁴ See annotation in 127 A. L. R. 1513 to *Kuroske v. Aetna Life Ins. Co.*, 234 Wis. 394, 291 N. W. 384 (1940).

ministering the test. This last objection had been raised in the cases of *State v. Morkrid*⁵ and *State v. Duquid*⁶ but in each instance the objection had been overruled as the record did not sustain the contention that the test had been coerced.

During the past fifty years there has been a noticeable inclination on the part of courts to admit into evidence the results of scientific tests designed to aid in the proof of criminal cases. Among forms of evidence now recognized are tests based on fingerprints,⁷ palm prints,⁸ ballistics studies,⁹ microanalysis,¹⁰ and photomicrographs.¹¹ In the light thereof it would not seem unreasonable to utilize scientific tests tending to prove the presence of intoxication provided a proper foundation is laid through a showing of the probability of accuracy, a demonstration that the results have been diligently and carefully recorded, and provided also it is made apparent that the defendant has voluntarily submitted to the test.¹²

JOINT TENANCY—SEVERANCE—WHETHER OR NOT A JUDGMENT SALE OF THE INTEREST OF ONE JOINT TENANT WILL OPERATE TO SEVER THE JOINT TENANCY PRIOR TO THE EXPIRATION OF THE PERIOD OF REDEMPTION—In the recent case of *Jackson v. Lacey*,¹ the Illinois Supreme Court dealt with the effect, prior to the period of redemption, of a bailiff's sale of the interest of one joint tenant, pursuant to a judgment lien which had attached thereto. The purchaser, who was the other joint tenant, received a certificate of purchase, but died before the period of redemption had expired and a deed could be issued. Thereafter, the first joint tenant, whose interest had been sold, quitclaimed his rights to the defendant. A suit for partition brought by the plaintiffs, heirs-at-law of the deceased judgment purchaser, was dismissed by the trial court. Appeal was taken directly to the Supreme Court, which affirmed the decree of the trial court, holding that the unities of title were not destroyed so long as a right to possession remained, and that the joint tenancy had not been severed by a

⁵ — Iowa —, 286 N. W. 412 (1939).

⁶ 50 Ariz. 276, 72 P. (2d) 435 (1937).

⁷ *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (1911).

⁸ *State v. Kuhl*, 42 Nev. 185, 175 P. 190 (1918).

⁹ *People v. Fisher*, 340 Ill. 216, 172 N. E. 743 (1930).

¹⁰ *People v. Wallace*, 353 Ill. 185, 175 P. 190 (1918).

¹¹ *People v. McDonald*, 365 Ill. 233, 6 N. E. (2d) 182 (1936).

¹² The defendant in the principal case contended that the test was not voluntarily taken, hence the use of the evidence amounted to a denial of his privilege against self-incrimination. The court disposed of the point on the ground that the defendant, by taking the case to the Appellate Court and by assigning error over which that court had jurisdiction, had waived the constitutional question. On that score, see *People v. Terrill*, 362 Ill. 61, 192 N. E. 734 (1935).

¹ 408 Ill. 530, 97 N. E. (2d) 839 (1951).

judicial sale which had not yet materialized into a valid deed of the debtor's interest.

Previously, the court had held that a joint tenancy would not be severed by the mere attachment of a judgment lien upon the interest of one joint tenant,² or by a levy thereon,³ but that severance would result through the issuance of a sheriff's deed,⁴ or through a compulsory transfer under a request for specific performance.⁵ By its decision in the instant case, the court has now substantially narrowed, for Illinois, the confines within which the relationship of joint tenancy will be destroyed through the process of enforcing a judgment upon the interest of one of the tenants. There is reason to believe that, in this state, nothing short of the expiration of the period of redemption and the issuance of a deed will suffice to destroy the joint arrangement.

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—WHETHER THOSE ENGAGED IN TRANSPORTATION OF SCHOOL CHILDREN TO AND FROM SCHOOL MUST EXERCISE THE HIGHEST DEGREE OF CARE FOR SAFETY OF PUPILS CONVEYED—In the case of *Van Cleave v. Illini Coach Company*,¹ the plaintiff, a school child, had been injured while a non-paying passenger on defendant's bus when, due to a sudden lurch of the bus, another child passenger was thrown upon the plaintiff. The defendant carrier operated under a contract with the school district to carry its pupils to and from school. The prime issue in the case concerned the degree of care required of the defendant carrier in transporting children, the defendant relying on the claim that its duty was to exercise no more than ordinary care. The trial court, however, found the defendant guilty of negligence and, on appeal, the Appellate Court for the Third District affirmed the decision.

As a general rule, courts have consistently held that private carriers are guilty of negligence, causing actionable injury to their passengers, only when they have not exercised ordinary care.² Common carriers, on the other hand, have always been required to exercise the highest degree of care in the transportation of their passengers.³ In the instant case, the

² *People's Trust & Savings Bank v. Haas*, 328 Ill. 468, 160 N. E. 85 (1928).

³ *Van Antwerp v. Horan*, 390 Ill. 449, 61 N. E. (2d) 358 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 205.

⁴ *Johnson v. Muntz*, 364 Ill. 482, 4 N. E. (2d) 826 (1936).

⁵ *Spadoni v. Frigo*, 307 Ill. 32, 138 N. E. 226 (1923).

¹ 344 Ill. App. 175, 100 N. E. (2d) 398 (1951).

² *Payne v. Halstead*, 44 Ill. App. 97 (1892). But see also Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 58a, as to liability for injury to a non-paying guest automobile rider.

³ *Coulton v. Illinois Central R. Co.*, 264 Ill. 414, 106 N. E. 1049 (1914).

court likened the duty of persons engaged in the transportation of school children to be the equivalent of that imposed on common carriers. Lacking any precedent in Illinois bearing directly on this point, the court turned to the Washington case of *Webb v. City of Seattle*⁴ for support. It is important to note that in neither the instant case nor in the Washington case does the court support the conclusion attained with any reasoning leading to a belief that those engaged in the transportation of school children should be held to the highest degree of care. In fact, in the instant case, the court goes so far as to state that whether the defendant was a common or private carrier was not to be deemed a controlling feature. If there is justification for this departure from a long-established distinction, it must, in all probability, lie in the fact that the court felt the very nature of the occupation, to-wit: carriage of school children, particularly those of tender years, called for the exercise of the highest degree of care. In all events, the decision, if upheld, would seem to open the door to the possibility of bringing cases involving the transportation of other varied classes of passengers under this unique rule. If so, economic and other factors which have supported prior classifications, with their attendant duties, will no longer afford sufficient ground for the making of future distinctions as to the bases for liability.

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER OR NOT A SPOUSE, BY CONTINUING TO ACT AS EXECUTOR AFTER RENOUNCING THE WILL, HAS WAIVED THE RENUNCIATION THEREOF—The testatrix, in the case of *In re Donovan's Estate*,¹ provided that her husband should be one of three named executors and further that he should be given certain bequests and devises. The husband, shortly after being appointed co-executor, filed a renunciation of the will but continued to act as co-executor. Subsequently the other co-executors filed a partial report in which they alleged that the husband, by continuing to act as co-executor, had waived his prior renunciation. The probate court sustained the husband's objections and dismissed the report. Upon appeal to the circuit court, for trial *de novo*, the partial report was approved. On direct appeal to the Illinois Supreme Court because a freehold was involved, the decision of the circuit court was reversed and the report was dismissed, the court holding that the husband's action in continuing to act as executor had not operated to nullify the renunciation of the will.

The court, in arriving at the foregoing conclusion, first ascertained that the effect of a renunciation was to reject the beneficial provisions of

⁴ 22 Wash. (2d) 596, 157 P. (2d) 312 (1945).

¹ 409 Ill. 195, 98 N. E. (2d) 757 (1951).

the will and to treat the same as if they had been obliterated therefrom,² for the statute provides that the renunciation shall operate to bar the spouse from any claim under the beneficial provisions of the will.³ Such being the consequence of a renunciation, it has been uniformly held that, once filed, the renunciation must stand and may be withdrawn only by order of court.⁴ The query in the case, therefore, became one as to whether or not the husband had engaged in such a series of acts as would warrant a court in arriving at the conclusion that the renunciation should be ordered withdrawn by reason of an estoppel growing from the husband's conduct in serving as co-executor. In that regard, the court indicated that the husband was related to the will in question in two different capacities, to-wit: as beneficiary and as executor. Conduct in one capacity, that is by way of renunciation filed by him as beneficiary, could not operate to create an estoppel against the same individual in his different capacity as executor, particularly since no one was harmed, as to the latter capacity, by anything done in relation to the former. To support a claim of estoppel, of course, it must appear that the conduct relied on invoked some form of harm.⁵ If the husband, in his capacity as husband, had obtained more than he would have been legally entitled to receive, there would have been some basis for the assertion of an estoppel, for injury would then be apparent.⁶ As, however, he gained a right to nothing beyond his statutory share, no injury had been done. Anything claimed by him in his capacity as co-executor, such as commissions and the like, would come to him by right of law rather than under the will, hence would amount to no more than a proper expense of administration, which could afford no basis for a claim of estoppel.

While there can probably be no criticism addressed either to the reasoning followed or to the result attained, the decision suggests the advisability of using appropriate language in a will to offset the possibility of a spouse electing to renounce the beneficial provisions thereof yet insisting on the right to serve in the capacity of executor in case he or she should have been so designated. If that is not what the testator desires, a few words would serve to disable the renouncing spouse from acting in any capacity under the will.

² *Sueske v. Schofield*, 376 Ill. 431, 34 N. E. (2d) 399 (1941).

³ Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 169.

⁴ *Hanson v. Clark*, 246 Ill. App. 496 (1927). See also 14 Am. Jur., Dower, p. 781.

⁵ *Canavan v. McNulty*, 328 Ill. 388, 159 N. E. 782 (1927).

⁶ *Kerner v. Peterson*, 368 Ill. 59, 12 N. E. (2d) 884 (1937).

BOOK REVIEWS

THE LAWS OF ILLINOIS TERRITORY 1809-1818. Edited, with introduction, by Francis S. Philbrick. Springfield, Illinois: Illinois State Historical Library, 1950. Illinois State Historical Library Collection, Vol. XXV (Law Series, Vol. V). Pp. cccclxxvii, 386.

Earlier releases of the Illinois Historical Society have provided necessary background in preparation for the publication of this current volume in the series dealing with the development of Illinois law.¹ Following in logical sequence thereon, there has now been issued this reproduction of the territorial laws enacted by the Illinois Territory subsequent to its separation from the Indiana Territory and prior to receipt of the grant of statehood. As the editor notes, there is little of particular interest in the statutes enacted, certainly none of them could be said to be outstanding contributions to legal science, yet they do provide a noteworthy link in legal progression from wilderness to civilization while furnishing some historical light on frontier conditions. Continuity in law, at least, was assured by a prompt recognition that the laws of the Indiana Territory "of a general nature" were still in force in the new territory,² but subject to such change as local conditions might require.

In the nine years that followed the creation of the Illinois Territory the change in legislative emphasis is worthy of remark. From the passage of laws for the suppression of gambling and duelling,³ for compensation of those who had erroneously improved the lands of others,⁴ as well as for the payment of bounties for the killing of hostile Indians⁵ and wolves,⁶

¹ See, for example, *Laws of Indiana Territory 1801-1809* (Illinois Historical Collection), Vol. 21, and *Pope's Digest 1815*, *ibid.*, Vols. 28 and 30.

² The Act of June 13, 1809, Ill. Hist. Coll., Vol. 25, p. 58, the first signed by Governor Ninian Edwards and Judges Alexander Stuart and Jesse B. Thomas, who constituted the territorial legislature during the first stage of settlement, to the effect that "on mature deliberation" these gentlemen were of the "opinion that the laws of Indiana Territory of a general nature and not local to that Territory" were still in force, is reminiscent of Ill. Rev. Stat. 1951, Vol. 1, Ch. 28, § 1. It declares that the common law of England "so far as the same is applicable and of general nature" shall be the rule of decision and shall be considered as of full force until repealed by legislative authority.

³ Acts of March 9, 1810, and of April 7, 1810; Ill. Hist. Coll., Vol. 25, pp. 27 and 36.

⁴ The preamble of the Act of Jan. 24, 1811, Ill. Hist. Coll., Vol. 25, pp. 41-5, declares that the unsettled state of the country had induced many persons to locate on land believed to be their own only to be evicted by paramount title but that it was "just that the proprietor of the better title [should] pay the occupying claimant for all valuable improvements made thereon," less any damage done during the occupancy. The thought is re-echoed in Ill. Rev. Stat. 1951, Vol. 1, Ch. 45, § 56 et seq.

⁵ Act of Dec. 24, 1814, Ill. Hist. Coll., Vol. 25, pp. 177-8. The bounty was \$50.00 per head, to be raised to \$100.00 if the killing occurred during an organized raid on hostile Indian territory. Earlier trouble with Indians is reflected in the Act of Dec. 17, 1812; Ill. Hist. Coll., Vol. 25, pp. 51-2.

⁶ A territorial law of Indiana Territory, dated Sept. 14, 1807, had been repealed by the Illinois legislature in 1811 but had been revived in 1814; Ill. Hist. Coll.,

the emphasis shifts to the passage of laws for the creation of banks and corporations,⁷ the regulation of warehouses,⁸ and for retaliation against foreign attorneys at law.⁹ Scattered throughout, however, are measures for the destruction of unauthorized water mills and dams,¹⁰ the granting of legislative divorces,¹¹ preserving the rights of owners of slaves whose servants had remained within the territory for periods beyond one year while working in the salt industry,¹² forbidding immigration by free negroes and mulattoes on penalty of whipping and expulsion,¹³ and prohibiting, on penalty of death without "benefit of clergy," the counterfeiting of bank notes or the possession of bank-note paper or engraved plates

Vol. 25, pp. 47 and 159. It was supplemented by another act dated Dec. 30, 1815, which required an oath of the bounty claimant that he had not "wittingly or willingly spared the life of any bitch wolf, in my power to kill, with a design of encreasing the breed." The text thereof suggests the thought that some persons were not above a slight infraction of the spirit of the law for the sake of profit. The bounty was raised on Dec. 21, 1816, to \$2.00 per head: Ill. Hist. Coll., Vol. 25, pp. 233-4.

⁷ A bank at Shawneetown was incorporated on Dec. 28, 1816; another at Edwardsville on Jan. 9, 1818; a third at Cairo on the same date; and a fourth at Kaskaskia on Jan. 12, 1818. Two navigation companies were established, and a law was passed, on Dec. 31, 1817, for the founding of incorporated medical societies with power to grant diplomas and licenses, on examination, to "practice physic or surgery, or both." See Ill. Hist. Coll., Vol. 25, pp. 239, 334, 340, 348, 284, 327 and 297, respectively.

⁸ *Ibid.*, p. 251. The regulation extended to inspection of quality, weight and storage charges as well as to the necessity of keeping of records.

⁹ The Act of Dec. 21, 1816, Ill. Hist. Coll., Vol. 25, pp. 238-9, contained a preamble to the effect that the conduct of the Indiana Territory in refusing to permit practice therein by qualified non-residents was "illiberal, unjust and contrary to those principles of liberality and reciprocity by which each and every state or territory should be governed." The law imposed a fine of \$200 on all persons who were residents of Indiana, even though licensed in Illinois, who should thereafter practice before the courts of the territory, together with a penalty of \$500 on the Illinois judge who should "knowingly suffer or permit" such practice.

¹⁰ Act of Dec. 25, 1812; Ill. Hist. Coll., Vol. 25, p. 64. A regulation dated Dec. 17, 1817, *ibid.*, p. 292, fixed the toll charge of the owner of a grist-mill, for its services, at a fraction of the whole quantity, typically one-eighth. The statute compares with the feudal custom of England which called for a "multure" of varying amount on all grain ground at the mill of the lord of the manor but averaging about a one-sixteenth part: Bennett, *Life on the English Manor* (Cambridge University Press, 1948), p. 133.

¹¹ An Act of Jan. 6, 1818, granted Elizabeth A. Sprigg a divorce from the bonds of matrimony against her husband James because he had "shamefully abandoned" her and had continued to live "in the most shameful incontinency." See Ill. Hist. Coll., Vol. 25, p. 309. The practice of enacting such divorce bills continued for a period after statehood: Zacharias, "Recrimination in the Divorce Law of Illinois," 14 CHICAGO-KENT REVIEW 217 at 233, particularly note 34.

¹² Act of Dec. 22, 1814; Ill. Hist. Coll., Vol. 25, pp. 157-8. There would seem to be a correlation here with the English practice of granting freedom to a serf who managed to dwell for a year and a day off the manor and in a privileged town without permission from the overlord: Pollock and Maitland, *History of English Law* (Cambridge University Press, 1911), Vol. I, p. 429.

¹³ Act of Dec. 8, 1813: Ill. Hist. Coll., Vol. 25, pp. 91-2.

with intent to use the same for that purpose.¹⁴ A territorial shortage of specie may be noted through the medium of a moratorium law adopted in 1816, one which granted a delay in payment up to as long as twelve months unless the creditor would signify a willingness to accept paper currency.¹⁵ The lack of a penitentiary, in contrast to the ever-present county jail, must have dictated the right to sell the labor of convicted felons for a term of seven years to the highest bidder.¹⁶

Is there not some basis for comment in the fact that the great bulk of the statutes enacted throughout the period, except for those erecting new counties or fixing the boundaries thereof, dealt with the judicial organization and methods of procedure before the courts?¹⁷ For that matter, what could not be said, in the matter of transition from territory to state and the influx of new people, in the translation in the monetary unit to the standard American dollar?¹⁸ A fitting climax to these territorial laws is revealed in the measure calling for a census of the inhabitants in anticipation that Congress might demand information on the size of the population before granting statehood.¹⁹

There would be scant justification for the introduction of 477 pages,

¹⁴ Act of Jan. 11, 1816; Ill. Hist. Coll., Vol. 25, pp. 225-8. While benefit of clergy had been recognized in certain of the American jurisdictions, *State v. Sutcliffe*, 4 Strob. 372 (S. C., 1850), there is no record of its application in Illinois. The drafters of the statute may have referred thereto, and expressly denied its application, from an excess of caution.

¹⁵ Act of Dec. 28, 1816; Ill. Hist. Coll., Vol. 25, pp. 246-7.

¹⁶ Act of Jan. 11, 1816; Ill. Hist. Coll., Vol. 25, pp. 225-8, particularly p. 229. The practice seems to have continued, even after the erection of a penitentiary, until 1867. See Zacharias, "Joseph Meade Bailey, 1833-1895," 16 CHICAGO-KENT REVIEW 1 (1937), particularly pp. 5-7.

¹⁷ Professor Philbrick states: "Not, indeed, equal in number to all the statutes already mentioned, but more than two-thirds as numerous, were those dealing with the administration of justice." See Ill. Hist. Coll., Vol. 25, p. xx. A provision adopted in 1812, one requiring security for costs from non-resident plaintiffs, at least in chancery causes, noted at p. 53, may have foreshadowed the present statute on the subject: Ill. Rev. Stat. 1951, Vol. 1, Ch. 33, § 1. It is also interesting to note that the policy of the times, perhaps fostered by the absence of courts of chancery in Massachusetts and Pennsylvania, deferred all equity proceedings until the law docket had been cleared: Act of Dec. 24, 1814, § 2; Ill. Hist. Coll., Vol. 25, pp. 171-2.

¹⁸ A measure in 1810 declared that judgments rendered by justices of the peace "when the amount thereof shall not exceed four dollars sixteen cents and two-thirds of a cent," i. e. four and one-sixth dollars, should be final and non-appealable: Act of Jan. 26, 1810, § 1; Ill. Hist. Coll., Vol. 25, pp. 19-21, § 1. By 1814, however, statutory charges of certain public officials were set in terms of dollars and eighths of dollars: Act of Dec. 24, 1814; Ill. Hist. Coll., Vol. 25, p. 169. The American "bit," or one-eighth of a dollar, has enriched colloquial speech with such expressions as "two-bits," "four-bits," etc.

¹⁹ See Act of Jan. 7, 1818, together with a supplemental act on Jan. 10, 1818: Ill. Hist. Coll., Vol. 25, pp. 315-7. The preamble of the latter was unduly pessimistic in tone. It opens with the words: "Whereas, it is doubtful whether the prayer of this general assembly to congress, requesting that the citizens of this territory may be permitted to form a state government, will be granted. . . ." Less than a year later, on Dec. 3, 1818, statehood had, in fact, been achieved.

longer than the text itself, if it dealt with no more than a commentary on these interesting but brief statutory materials. While that introduction treats therewith in part, it is far more important for the editor's discussion of the formulation and passage of the celebrated Northwest Ordinance of 1787, together with his analysis of the legal character thereof and the deficiencies inherent therein. Not content with the volume of writing on that point already in print, much of which the editor notes is based on "fantasy for evidence," Professor Philbrick has marshalled a tremendous wealth of material to prove that the ordinance was principally the handiwork of Nathan Dane, founder of the Dane Professorship at Harvard Law School and writer on American law,²⁰ rather than that of Thomas Jefferson and his compatriots. The erudition and effort displayed in that behalf, while providing just cause for congratulation to the editor for having set the record straight, will hardly produce a ripple in American politics. Tradition, even though demonstrably false, dies hard. Accepting Jefferson's acknowledged contribution to the thought underlying the Northwest Ordinance, the author goes deep into the conditions and circumstances leading to the adoption thereof and the political philosophy represented thereby. In that process, he demonstrates the fallacy of the belief that it was, as the politician would proclaim, a "charter of freedom." In fact, he proves that it operated to fix upon the frontier that same colonial status from which the seaboard had but so lately rebelled. Here is no "debunking" process for the sake of dramatic effect alone. The introduction, then, is an example of that accurate, careful, penetrating and scholarly study of American historical developments which the country needs and should welcome.

W. F. ZACHARIAS

SEX AND THE LAW. Morris Ploscowe. New York: Prentice-Hall, Inc., 1951. Pp. ix, 310.

Via the introduction to this thought-provoking book, Roscoe Pound again finds a vehicle through which to deplore the inadequacy of our present methods of law-making and the means too frequently pursued in preparation for that legislation. It is not lobbying, even beneficent lobbying, he argues, that we need so much as it is that we require a permanent and established ministry of justice capable of dealing with legal questions as wholes rather than as detached local fragments. Many will be inclined to echo his belief, at least as that belief relates to the area of family life, for fundamental social mores vary but slightly around the country while social problems remain fairly constant in all areas. Whatever deviation

²⁰ Ill. Hist. Coll., Vol. 25, p. cccixviii, note 324.

exists in law from a socialized norm too frequently lies at the door of haphazard legislation not infrequently the ill-considered product of momentary prejudice or temporary public clamor. The inevitable collapse of justice induced by the indiscriminate enforcement of such piece-meal measures has done more to breed disrespect for law as a governing force in a civilized community than any other modern phenomenon. That record has already been written at large; it remained for this book to pinpoint the details.

Judge Ploscowe's book, designed more nearly for the layman than the specialist, provides an incisive analysis of the impact sex has played in shaping the diversity of both state and federal laws and legal doctrines as they relate to marriage, divorce, annulment, sex crime, prostitution, and similar matters. Basic differences have been noted and the problems generated thereby are discussed at length. Thoughtful recommendations, drawn from the author's experience with law in action in the country's largest city, have been advanced without the desire to display the zeal of the crusader or partake of the role of propagandist. The result of this much restraint, when buttressed by the accompanying statistical material, reveals how large is the influence on the public mind of that which is notoriously shocking in matters of sex whereas it is the more frequent but less disturbing aspects thereof which produce the larger share of problems. Here is no text on the law of domestic relations, although parts of the book read like one; here is no comparative chart of divergent state laws, such as the one mapped out by Professor Vernier; but here is a sharp demonstration of the need for a deep reconstruction of all law revolving around the effect of sex on modern human life.

CASES AND MATERIALS ON EVIDENCE, Third Edition. Edmund M. Morgan and John MacArthur Maguire. Brooklyn: The Foundation Press, Inc., 1951. Pp. xxi, 980.

In the preface to this third edition of a well-known casebook, the authors happily and clearly justify the revision and reorganization they have made of the cases and the materials. That justification is worded not in generalities but in the form of specific references to topics together with their treatment, whether by abbreviation or by expansion. The sequence of topics has been substantially retained but if it were not, a different arrangement would provide no hardship to a flexible teacher. Nonetheless, the opening sequence of judicial notice, burden of proof and presumptions is a logical and familiar doorway to the more difficult topics that follow.

In the preface, the authors speak of the re-working and expansion of

such items as the privilege against self-incrimination, the use of illegally obtained evidence, and of confessions, in which recent developments bulk large. Despite this expanded treatment, one area does not seem to be adequately covered. It deals with the authority for congressional and legislative committee inquiries, with the depth and breadth thereof, with the technique for enforcing discovery, with the punishment of the recalcitrant witness, with the use to be made of evidence discovered, and with the justifiable inferences to be drawn therefrom. This, admittedly, may be too much to expect, for the content might, more properly, be assigned to a course in Constitutional Law, or be distributed to more relevant spheres. Yet since the prevailing purpose of committee hearings is the acquisition of evidence, some well rendered opinion sufficiently broad and penetrating would add greatly to a matter of extreme public interest. The case of *Ex parte Johnson*, at page 418, is helpful but not quite sufficient, even with its fairly copious footnotes.

The chapter dealing with relevancy, remoteness and the like, could have been curtailed somewhat. While relevancy may be said to be a question of logic, it is equally one of experience. In the trial of an actual case, the presiding judge is more apt to lean upon his personal experience or that personal intuition which flares up in the heat of many rapidly moving and contradictory factors. He is likely, at that moment, to admit or restrict evidence which, upon cold appellate review, may well have lost its relevant and persuasive character. Perhaps this is merely another way of saying that probative evidence is oftentimes admitted before administrative tribunals that would have been screened out in a common-law court. It is, of course, not intended to confuse relevancy with hearsay. Consistent with the statement of the authors, there is justification for a greatly increased attention to probative procedure before administrative tribunals. The cases selected for this purpose are excellent and would bear careful reading by those lawyers who were admitted to practice before the current decade.

There are, on the market, three excellent casebooks on the subject of Evidence. The variations in purpose and content are not great although the organization and emphasis differ somewhat. Those teachers who have experienced pleasure and satisfaction in teaching from Morgan and Maguire's second edition may anticipate renewed satisfaction in the use of the third edition.

LEGAL AID IN THE UNITED STATES: A Study of the Availability of Lawyer's Services for Persons Unable to Pay Fees. Emery A. Brownell. Rochester, New York: The Lawyers Co-operative Publishing Company, 1951. Pp. xxiv, 333.

A review of a book written on a national scale probably should be addressed to a national audience or, better yet, be cosmic in its scope. Instead, this review will be addressed to the Illinois lawyer. The topic concerns him and his appreciation of, or failure to acknowledge the need for, legal aid; his efforts, or the absence thereof, to promote equal justice under law; and the degree of financial support, or the lack of it, which he has given to insure that none shall go without legal counsel for lack of funds.

In this challenging, yet dispassionate, report concerning the history, status, and significance of the legal aid movement, the record exposes the degree to which the Illinois lawyer, together with others of his kind, has failed to carry out his professional obligation to assure competent administration of justice toward the needy, in order that none should suffer for want of the services of a skilled protector. The cry is not that he has done nothing; it is, more nearly, that he has not done enough. When large and populous areas of the state lack focal points to which the destitute may turn; when two-thirds or more of the population are ignorant of the fact that legal help is available at less than anticipated cost; when one-half or more of the population, in need for professional service, fail to go to lawyers for help, there is reason to assert that the Illinois lawyer has fallen down on his job!

True, the record for Illinois is not as deplorable as that written for other areas of the country. Chicago, at least, spends the munificent sum of one and one-half cents per annum per capita to provide legal aid service in civil cases! Cook County expends a like sum to provide the services of a public defender in criminal cases of the rank of felony! The Chicago Bar Association initiated the Lawyer Reference Plan, now working with considerable success! Untold hours of valuable time unquestionably are devoted by volunteers throughout the state, men who frequently spend more than just their time. But the stark fact remains that organized legal aid still falls far short of realizing the goal it must attain if, in a democratic state, the ideal of liberty, justice under law, is to be preserved.

This may sound like sharp criticism, with no measure of praise for the untiring effort expended by those who have brought a degree of legal service to the aid of the poor. It is that, for the percentage of those who have aided the cause of Legal Aid is in inverse proportion to those who

have not, just as the percentage of money expended on it dwindles before the profligacy shown elsewhere. The criticism expressed, however, is that of the reviewer, not that of the author. The latter, from the depth of his experience and careful research as Executive Director of the National Legal Aid Association, has written a straight-forward account, documented with tables, charts and appendices, carefully summarizing the extent, the nature, and the adequacy of existing facilities for legal aid. He has sketched the scene without rancor. It is by reading out from an uninfamed text, by noting statistical and other sober-sided comparisons, that one reaches a judgment concerning the sufficiency of the Illinois effort. It is a judgment, however, which any reader could form for himself, as the report presents him with the most authoritative compilation of facts yet gathered on the subject.¹

A STUDY OF UNAUTHORIZED PRACTICE OF LAW. Edwin M. Otterbourg. Chicago: The American Bar Association Standing Committee on Unauthorized Practice of Law, 1951. Pp. vi, 84 (Paper).

Among the spate of reports beginning to appear in print, growing from the current Survey of the Legal Profession, is this slender but vigorous statement concerning the public need for the suppression of law practice by unauthorized persons and the steps which have been taken toward achieving that end. Not intended as an exhaustive survey of the entire field of unauthorized practice, for earlier publications have done much of the spade work therein, it brings prior material up to date while, at the same time, furnishing an excellent account of the accomplishments achieved by conference groups composed of lawyers and the representatives of those most likely to cross the boundary line set up between law practice on the one hand and business activity on the other. A series of appendices serve to tabulate related statutory materials, to furnish a guide to the annotated reports of adjudicated cases, and to catalog other significant data of use to every unauthorized practice committee. This masterly statement of the public dangers which can, and do, flow from acts of unauthorized practice should be given widespread attention. It could well be worked over into a series of articles for publication in the general press in order that its message might be made available to every citizen.

¹ The report was prepared as one of a series of reports for the Survey of Legal Profession being conducted under the auspices of the American Bar Association. It bears a foreword by Harrison Tweed, President of the National Legal Aid Association, who stresses the fact that legal aid and representation should be available to all, should be afforded under supervision of the bar as a matter of voluntary effort, and be supported by laymen as well as lawyers. An introduction by Reginald Heber Smith, Director of the Survey, adds comment on the relative value of governmental, as contrasted with private, financial support for the movement. The book also contains a directory of all Legal Aid offices currently in existence.

JURISPRUDENCE—ITS AMERICAN PROPHETS: A Survey of Taught Jurisprudence. Harold Gill Reuschlein. Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1951. Pp. xvii, 527.

Professor Rodell once wrote that in "Tribal times, there were medicine men. In the Middle Ages there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day."¹ Much the same sentiment has been expressed by others, if not over the activities of the practicing lawyer group then at least with those of the jurisprudentialists, of whatever category.² By the mysticism of their language, the abstruseness of their ideas, the unreality of their writings, these juristic analysts have tended to form an autocratic cabal dominating a scene of the law, leaving the uninitiated to stand aghast at the seeming profundity of their learning or impatient with their petty squabbles over method. The increase in varying schools of jurisprudence, the multiplication in the number of prophets, few of whom ever agree with one another, tend to cause the average person to wish to shake off the whole idea as a bad dream or else to arouse in him a savage desire to threaten extermination for the whole crew. Like the student of old, he finds himself, too often, "coming out through the door in which" he went. If, unguided, he should endeavor to wade through the reams of printed material on the subject of jurisprudence, he would, again only too often, be apt to find himself coming back before he had even departed.

Through the medium of this current work in the general field of jurisprudence, such a person would find himself at least furnished with a comprehensive survey of the several writers who have labored in the American sphere, together with a summary of their principal ideas. He would, at least, have a survey point by which he might measure his progress if he would, as the author thinks he should, work more deeply into the product of each. It is doubtful if, as the publishers claim, he would get a working knowledge of jurisprudence from the perusal of these synopses of juristic thought, but he would have some sort of base for further analytical study. He would, without doubt, become acquainted with the methods of approach utilized by the several schools and could learn to distinguish an Austinite from a Neoscholasticist, for the range

¹ Rodell, *Woe Unto You Lawyers!* (Reynal & Hitchcock, New York, 1939), p. 3.

² See, for example, a review of Jerome Hall's *Living Law of Democratic Society* in 28 CHICAGO-KENT LAW REVIEW 183.

of the work is wide and complete. A valuable appendix provides biographical material concerning the several prophets together with a list of their chief writings. All in all, the author has done a good job.³ He has prepared no mere compendium of extracts designed to present a distillation from the most illustrative expressions of each of the prophets. He has provided a valuable commentary on the significance of the contributions each has made toward the development of a science of jurisprudence.

INCOME TAX TREATMENT OF LIFE INSURANCE PROCEEDS. William J. Bowe. Nashville, Tennessee: The Vanderbilt University Press, 1951. Pp. 90.

The answers which could be given to the query as to what it is that could make an author wish to turn out book after book, year after year, would unquestionably prove to be amazing from the standpoint of the degree of their wide diversity. Some authors, like a Sir Walter Scott or a President Grant, have written in such fashion to raise funds in order to remove the stigma of bankruptcy. Others, such as an Alexander Dumas, it is said, have based the volume of their output on the picking of the brains, or the working of the pens, of less illustrious men. Still others, as for example a Charles Dickens, have poured out their inner feelings in a torrent in order to gain desired reforms. Professor Bowe, neither bankrupt nor literary pirate nor reformer, by way of introduction to his latest publication,¹ discloses his *modus operandi* as commentator on aspects of tax law to be one proceeding from speech, through law review article, to bound book.

In the process, the law has been enriched with another objective account of the tax consequences attendant upon the purchase of life insurance or the making of gifts. The chapters of this book, each constitut-

³ It is apparent that the printer has not performed nearly so well. Typographical errors are evident, and not entirely of the variety apt to be overlooked in proof-reading. It would be possible to excuse such mistakes as "histoircal" for "historical" (p. 214); "significant" for "signficant" (p. 304); "familarity" for "familiarity" (p. 323); and "giude" for "guide" (p. 410). What can be said, however, for faults such as "plated" for "played" (p. 15); "priviledged" for "privileged" (p. 90); "forcable" for "forcible" (p. 118); "supersilious" for "supercilious" (p. 163); "correlaries" for "corollaries" (p. 217); "principals" for "principles" (p. 353); or "depracating" for "deprecating" (p. 354)? The penchant for error commonly found in works in this field, heretofore noted in a review of Gurvitch, *Sociology of Law* (Philosophical Library, New York, 1942), appearing in 20 CHICAGO-KENT LAW REVIEW 283, promotes the thought that perhaps jurisprudentialists should either (1) learn to spell, (2) write in every-day English, or (3) train printers and proofreaders in the mysteries of their "plain and fancy hocus-pocus."

¹ Professor Bowe's 1949 book, one entitled *Tax Planning for Estates*, was reviewed in 28 CHICAGO-KENT LAW REVIEW 186; his 1950 release, designated *Life Insurance and Estate Tax Planning*, was discussed in 29 CHICAGO-KENT LAW REVIEW 286.

ing a complete topic, have previously been delivered as speeches and published in five separate law journals. They have now been conveniently arranged under one cover as well as brought up to date.² There might be occasion to criticize the injection of the fifth one, a section dealing with cash and accrual methods of tax accounting, on the score of disassociation from the rest. Any fault of that kind, however, can be overlooked in view of the obvious intention to make the book useful to those not already familiar with tax law or conscious of the tremendous degree of interrelation between its parts.

INTRODUCTION TO THE STUDY OF LAW. Bernard C. Gavit. Brooklyn, New York: The Foundation Press, Inc., 1951. Pp. xvi, 388.

A rapid survey of law school catalogs would tend to impress the surveyor with the fact that the "sink or swim" method still characterizes the style pursued by many law schools in opening up the study of law to beginning students, for few appear to teach, by whatever name, orientational or introductory materials. It is fallacious to suppose that the beginning law student, regardless of the length of his prelegal course, is equipped to undertake intensive law study on the day his first semester or term begins. There will be much that is foreign to him, not alone in the form of legal institutions and legal language but also in terms of legal thought and legal method. Prior generations of law students struggled to assimilate these matters as rapidly and as best they might; frequently too late to avoid scholastic difficulty. In the interest of the modern generation of students, much effort has been displayed in their behalf, not so much to avoid the shock of contact with the hard core of taught law as to provide ready access to urgently needed information.¹ Dean Gavit has now added welcome contribution to the field with his book, one written with the prelaw and beginning law student particularly in mind. In content, the book summarizes such matters as the sources and forms of law, legal concepts, the judicial function, the court system, methods of procedure, the common forms of action, both legal and equitable, and the

² See pages 56-9, for example, for a discussion of the case of *Emeloid Co., Inc. v. Commissioner*, 189 F. (2d) 230 (1951), reversing 14 T. C. 1295 (1950), the opinion in which case was not released until May 10, 1951.

¹ Illustrative thereof are books such as Morgan, *Introduction to the Study of Law* (Callaghan & Co., Chicago, 1926), now in a second edition; Kinnane, *A First Book of Anglo American Law* (Bobbs-Merrill Co., Indianapolis, 1932); Kinyon, *How to Study Law and Write Law Examinations* (West Publishing Co., St. Paul, 1940); and Fryer and Benson, *Legal Method and Legal System* (West Publishing Co., St. Paul, 1950), one volume edition. The last mentioned book is replete with cases and materials but the presentation is fragmentary in character and requires re-arrangement to blend the parts into a connected account of the development of a legal system.

books of the law. As a teaching device for adoption where an orientation course is given, the book may be lacking in some particulars,² but for use elsewhere, as in those institutions where no preliminary training is given, it should operate to provide much needed and desirable information. The book should, therefore, command a wide and ready market, particularly since it admirably carries out the author's purpose in preparing it.

CASES ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ASSOCIATIONS. Judson A. Crane and Calvert Magruder. Indianapolis, Indiana: The Bobbs-Merrill Company, 1951. Pp. v, 837.

The growing tendency toward combining the study of the partnership with that of the corporation and of agency has made it increasingly difficult for those schools teaching the first of these subjects as a separate course to locate adequate and up-to-date instructional material. The publication of the second edition of this work has provided definite alleviation. It not only presents an adequate coverage of the law of partnership but also contains separate sections devoted to the limited partnership, the joint stock company, the business trust, and the joint venture. The authors, whose first edition made its appearance in 1923, have included in the new book not only the classical cases but recent decisions as well, the latter illustrating both the significance of the Uniform Partnership Act and the necessity of taking modern business needs into account in the drafting of partnership agreements. The importance of taxation and bankruptcy problems in relation to unincorporated business associations has been treated via the medium of a number of cases which should furnish the instructor with adequate opportunity to introduce the student to the many intricacies connected therewith. The casebook contains no unique features nor has any attempt been made to alter radically the method for teaching the subject. It is, in brief, an excellent presentation of a traditional subject in a traditional manner.

² A course entitled Legal System, for example, given to beginning students at Chicago-Kent College of Law, includes instruction on the legal profession and its canons of ethics. While Dean Gavit's book touches on these points, only a few of the canons are cited or illustrated, but the full text is not included nor considered. The inclusion of an appendix containing this much material might prove helpful if supplementation is not possible. There is also scant treatment of the law school method which justifies the use of the casebook system, yet the beginning student must, almost invariably, cope with casebooks from the very start.